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THE EXTENT OF THE MARGINAL SEA

A COLLECTION OF OFFICIAL DOCUMENTS AND
VIEWS OF REPRESENTATIVE PUBLICISTS

PREPARED BY
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13

PREFATORY NOTE.

The present volume of views and documents bearing upon the extent of the marginal sea is divided into two sections: Part I contains excerpts from the publications of representative publicists; Part II is a compilation of official documents. The documents in Part II are printed in chronological order under countries in alphabetical order. When a document, as a treaty, emanates from two Governments, it is noticed under both countries, but the text appears under only one of them, a footnote reference being made under the other to the page where the text is to be found. Treaties which are expressions of more than two Governments, as the North Sea and the Hague Conventions, are to be found at the beginning of Part II, in the section termed "Polynational." In many of the documents the words indicating the extent of the territorial sea have been printed editorially in italics to assist the eye. Owing to the limited time available for collecting documents, a number of them are entered only by captions and reference to the authors citing them. Also, a few documents, which were located too late to be inserted in their proper places in the body of the text, have been appended as "supplementary documents."

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BIOGRAPHY.

AZUNI, DOMENICO ALBERTO. Italian jurisconsult; born in 1760; died in 1827; pursued the study of commercial and maritime law at the University of Turin. Among the works of Azuni are: *Droit maritime de l'Europe*, 1805; *Origine du droit et de la législation maritime*, 1810; *Mémoires pour servir à l'histoire des voyages maritimes des anciens navigateurs de Marseille*, 1813, and *Système universel des armements en course et des corsaires en temps de guerre*, 1817.

BARCLAY, SIR THOMAS. Barrister; born 1853; senior vice president of the Institute of International Law; vice president of the International Law Association; member of the Royal Academy of Jurisprudence of Spain; examiner in jurisprudence and international public and private law at the University of Oxford. Among the most important of his works are the following: *Problems of International Practice and Diplomacy*, 1907; *The Turco-Italian War and its Problems*, 1912; *Companies in France*, 2d ed., 1899, and articles on international law in the *Encyclopedia of the Law of England*, the *Encyclopædia Britannica*, 1911 ed., and the *Law and Usage of War*, 1914.

BLUNTSCHLI, JOHANN KASPAR. German jurist and politician; born in 1808; died in 1881; founder, member, and president (1875-77) of the Institute of International Law; professor of law in the University of Zürich; of German and international law at Munich and of political science and jurisprudence at Heidelberg. In 1861 he presided over the International Congress of Jurists in Dresden and was the German representative at the Brussels conference on the laws of war. Bluntschli is generally considered one of the greatest European authorities on international law. His works include: *Le Droit International Codifié*, 5th rev. ed., 1895; *Geschichte des allgemeinen Rechts*, 1864; *Das moderne Kriegesrecht*, 1866; *Das moderne Völkerrecht*, 1868, and *Die Lehre vom Staat*, 1875.

BONFILS, HENRI JOSEPH FRANÇOIS XAVIER. French jurisconsult; born in 1835; died in 1897; professor of commercial law at the University of Toulouse, at which institution he was also the dean of the law faculty in 1879. Besides *Manuel de droit international public*, which has gone through seven editions (seventh edition, Paris, 1914) and is considered in France a standard authority on international law, *Traité élémentaire d'organisation judiciaire, de compétence et de procédure*, 1885, is a work well worthy of mention.

BOUCHER, P. B. Boucher lived at the end of the eighteenth and the beginning of the nineteenth century; he was a French jurisconsult and professor of commercial and maritime law. Among his works may be mentioned: *Institution au Droit Maritime*, 1803; *Consulat de la mer, ou Pandectes du droit commercial et maritime*, 1808; *Institutions commerciales, traitant de la jurisprudence marchande et des usages de négoce*, 1801; *Les principes du droit civil proprement dit et du droit commercial comparés*, 1804, and *Traité de la Procédure civile et des formalités des tribunaux de commerce*, 1808.

VAN BYNKERSHOEK, CORNELIUS. A Dutch jurist; born in 1673; died in 1743. He pursued his legal studies at the University of Franeker and practiced as an advocate at The Hague. In his capacity of member and of president of the supreme court he found that the common law of his country was very defective, and he resolved upon a reform. With this end in view, he published various works on civil law, the most important of which was the *Observationes Juris Romani*. The most famous of his works on international law, which acquired wide celebrity, are *De Dominio Maris*, 1703, and *Quaestiones Juris Publici*, 1737. A complete edition of his works was published at Geneva in 1761.

CALVO, CARLOS. Argentinian publicist and diplomat; born in 1824; died in 1906; member of the Institute of International Law. Mr. Calvo entered the consular service of his country at an early date, and later was Argentinian minister at Berlin and Paris. He therefore was familiar with the theory and practice of international law. His most important works are: (1) *El derecho internacional teórico y práctico de Europa y América*, Paris, 1868, 2 vols. It was also expanded and published in French under the title, *Le Droit international théorique et pratique*, the fifth edition of which appeared in 1896 in six volumes. (2) *Dictionnaire de droit international*, 1885, 2 vols. This work covers the field of international law, public and private, in the form of brief articles, arranged alphabetically under appropriate headings, and is especially valuable for the biographical notices of the various publicists who have treated international law. Mr. Calvo is regarded as the leading Spanish writer on international law, and as a Latin American by origin his various treatises have a peculiar value as a statement of the Latin American theory and practice as well as the system of international law as understood and applied in Europe.

CARNAZZA-AMARI, GIUSEPPE. Italian publicist, born in 1837; died in 1911; member of the Institute of International Law; professor at the University of Catania. The writer has published many works, notably on nonintervention and blockade, among which may be mentioned *Del blocco marittimo*, 1897; *Elementi di diritto internazionale*, 1866-1874; and *Trattato sul diritto internazionale pubblico di pace, second edition*, 1875, of which a French translation (*Traité de droit international public en temps de paix*) was published in Paris in 1880-1882 by Montanari-Revest.

CAUCHY, EUGÈNE. French publicist; born in 1802; died in 1877; member of the Institute of France (*Académie des sciences morales et politiques*) and of the Institute of International Law. The author was especially devoted to the study of maritime law, and his work, *Le droit maritime international* (Paris, 1862), which was awarded a prize from the *Académie des sciences*, is one of the best and most complete books on the subject ever published. The *Respect de la propriété privée dans la guerre maritime*, published in Paris in 1866, had its origin in the controversies between England and America of that year.

CREASY, SIR EDWARD SHEPHERD. English historian; born in 1812; died in 1878. In 1840 he was appointed professor of modern and ancient history at the University of London, and in 1860 Chief Justice of Ceylon. He is most widely known for his *Fifteen Decisive Battles of the World*, which, first published in 1851, has passed through many editions. His other works, not so popular but in many cases of almost equal merit, include an *Historical and Critical Account of the Several Invasions of England*, 1852; *History of the Ottoman Turks*, 1854-56; *Imperial and Colonial Constitutions of the British Empire*, 1872, and *First Platform of International Law*, 1874.

CUSSY, FERDINAND BARON DE. French publicist; born in 1795; died in 1866. He became successively secretary of the Legation, subdirector to the Ministry of Foreign Affairs, and consul general at Palermo. De Cussy has published in collaboration with Karl von Martens, *Recueil manuel et pratique de traités, conventions et autres actes diplomatiques*, Leipzig (5 vols.), and in collaboration with A. d'Hauterive, *Recueil des traités de commerce et de navigation de la France avec les puissances étrangères depuis la paix de Westphalie*, Paris 1834-1844 (10 vols.). His *Phases et causes célèbres du droit maritime des nations* (Leipzig, 1856), has attained considerable authority in maritime international law.

DANA, RICHARD HENRY. An American author; born in 1815; died in 1882; graduate of Harvard; studied law and attained eminence in practice; prosecuted his studies on international law in Europe. He wrote *Two Years Before the Mast* in 1840, and *The Seaman's Friend* in 1841. The latter was reprinted in England as *The Seaman's Manual*. He contributed to legal journals and to the *North American Review*; wrote *To Cuba and Back*, 1859, and edited Wheaton's *International Law*, 1866.

DESPAGNET, FRANTZ CLÉMENT RENÉ. French publicist; born in 1857; died in 1906; member of the Institute of International Law; professor of international law at the University of Bordeaux. His works include: *La diplomatie de la troisième république et de droit des gens*, 1904; *La guerre sud-africaine au point de vue du droit international*, 1902; *Précis de droit international privé*, fifth revised and augmented edition, 1909; and *Cours de Droit International Public*, fourth edition, 1910.

FIGE, PASQUALE. An Italian jurist; born in 1837; died in 1914; member of the Institute of International Law; professor of constitutional and international law at the Universities of Urbino, Pisa, Turin, and Naples. He wrote the following works, some of which have been translated into French and Spanish; *Elementi di diritto costituzionale*, 1862; *Trattato di diritto internazionale pubblico*, 1879; and *Trattato di diritto internazionale penale* and *Diritto internazionale privato*, 1901. Also *Il Diritto internazionale codificato e la sua sanzione giuridica*, of which the fifth edition has been translated into English by Edwin M. Borchard, under the title: *International Law Codified and Its Legal Sanction, or The Legal Organization of the Society of States* (New York, 1918).

GROTIUS, HUGO. A distinguished Dutch jurist, scholar, and statesman; born in 1583; died in 1645. He entered the University of Leyden at twelve years of age and conducted his first case at the bar as early as 1599; was appointed fiscal general in 1607 and council pensionary at Rotterdam in 1613. In 1719, as a result of political activities, he was sentenced to imprisonment for life, but escaped and fled to France, where he wrote his famous *De jure belli ac pacis* (Amsterdam, 1625). This work, which may be considered the very basis of all international law, has run through a great many editions. A photographic reproduction of the 1646' edition appears in the Classics of International Law (Washington, D. C., 1913). Other notable publications are: *De jure praedae* (written about 1604-5 but first published in 1868) *Mare liberum* (1608); and *Annales et historiae de rebus belgicis* (1657).

HALL, WILLIAM EDWARD. British publicist and member of the Institute of International Law; born in 1835; died in 1894. Mr. Hall is known in international law for his *Rights and Duties of Neutrals*, 1874, and especially for his masterly *Treatise on International Law*, first published in 1880. The latter work has run through six editions, and has been regarded as an authority—indeed, a classic—from the date of its first appearance, in 1880.

HALLECK, HENRY WAGER. American general and jurist; born in 1815; died in 1872; secretary of state for California under the military government; member of the committee which drafted the State Constitution of California; 1862–1864 General in Chief of the Armies of the United States; 1865 Chief of Staff of the Army. Besides *International Law* (fourth edition, London, 1908), his writings include the following: *Military Art and Science*, 1846; *Mining Laws of Spain and Mexico*, 1859; and *Treatise on International Law and the Laws of War, prepared for the use of Schools and Colleges*. He translated Jomini's *Vie politique et militaire de Napoléon*, 1864, and de Fooz's *On the Law of Mines*, 1860. The works on international law mentioned above entitle General Halleck to be considered as one of the great jurists of the 19th century.

HAUTEFEUILLE, LAURENT BASILE. French jurist; born in 1805; died in 1875; member of the Institute of International Law. His works, which are considered authoritative on maritime international law, include: *Des droits et des devoirs des nations neutres en temps de guerre maritime*, third edition, 1868; *Histoire des origines, des progrès et des variations du droit maritime international*, second edition, 1869; *Questions de droit maritime international*, 1862, and *Le principe de non-intervention et ses applications*, 1863.

KENT, JAMES. An eminent American jurist; born in 1763; died in 1847; professor of law in Columbia College; justice of the State Supreme Court; was promoted to chief justice in 1804, and to the position of chancellor in 1814. He has won a high reputation both as common law and equity judge, and his judicial opinions are still regarded as valuable and authoritative expositions of legal and equitable principles. His famous *Commentaries upon American Law* is a compilation of lectures which were delivered at Columbia. They have passed through fourteen editions (fourteenth edition, Boston, 1896) and continue to rank as a legal classic.

KLÜBER, JOHANN LUDWIG. German publicist; born 1762; died 1837; professor of law at the Universities of Erlangen and Heidelberg; held high positions in the Government service at Karlsruhe and attended the Congress of Vienna, collecting the *Acten des Wiener Kongresses in den Jahren 1814 und 1815*. Later he was appointed privy councillor in the Ministry of Foreign Affairs, attended the Congress at Aix-la-Chapelle, 1818, and took part in other important political negotiations. Among his publications may be mentioned *Oeffentliches Recht des Deutschen Bundes und der Bundesstaaten*, 1822, and *Le droit des gens moderne de l'Europe*, second edition, 1874, of which the latter is far the most important.

DE LAPRADELLE, ALBERT GEOUFFRE. French contemporary publicist; born in 1871; member of the Institute of International Law; professor of international law. The author has become an authority on this subject and, as a contributor to and joint editor of some of the leading international law periodicals, is one of the foremost writers in France. Among his works may

be mentioned: *De la nationalité d'origine, droit comparé—droit interne, droit international*, 1893; *Théorie et pratique des fondations perpétuelles*, etc., 1895; "The Right of the State over the Territorial Sea," in *Revue générale de droit international public*, vol. 5, 1898; *Recueil des arbitrages internationaux*, 1905.

DE LATOUR, JOSEPH JEAN BAPTISTE IMBART. French advocate; born in 1859; doctor of law; member of the *Société nivernaise des lettres, sciences et arts*. Among his writings are *La Pêche dans le droit international*, 1885; *La Mer territoriale au point de vue théorique et pratique*, Paris, 1889, which was awarded the prize by the *Académie des sciences morales et politiques au concours Bordin*, 1888; *La Papauté en droit international*, 1893.

LAWRENCE, REV. THOMAS JOSEPH. English publicist; born 1849; member of the Institute of International Law; lecturer on international law at the Royal Naval College, Portsmouth; deputy professor of international law at Cambridge; professor of international law in the University of Chicago 1892–1893; reader in international law in the University of Bristol. Among his numerous works are: *Disputed Questions in Modern International Law*, 1884; *Handbook of Public International Law*, 1885; ninth edition revised and brought up to date, 1915; *Principles of International Law*, 1895; *War and Neutrality in the Far East*, 1904; *International Problems and Hague Conferences*, 1908; and *Documents illustrative of International Law*, 1914.

VON LISZT, FRANZ. Contemporary German publicist; born in 1851; member of the Institute of International Law; Privy Councilor of Justice; doctor of law; attended the Universities of Wien, Göttingen, Heidelberg; professor at Giessen, Marburg, Halle, Berlin; director of the college of criminal law at the University of Berlin. He is a voluminous writer on the subject of criminal law. His works include: *Lehrbuch des deutschen Strafrechts*, eighteenth completely revised edition, 1911; *Ein mitteleuropäischer Staatenverband als nächstes Ziel der deutschen auswärtigen Politik*, 1914; *Die Reform des Strafverfahrens*, 1906; *Strafgesetzbuch für das deutsche Reich*, twenty-fourth edition, 1914; *Das Völkerrecht, systematisch dargestellt*, ninth revised edition, 1913. He is also one of the editors of *Zeitschrift für die gesamte Strafrechtswissenschaft* and *Deutsche Strafrechtszeitung*.

MARTENS, FEDOR FEDOROVICH. Russian publicist; born in 1845; died in 1909; professor, diplomat, and arbitrator in international controversies; member of the Institute of International Law; member of the permanent court of arbitration at The Hague; Russian delegate to many international conferences, including the two Hague Peace Conferences. Among his works on international law the two most important are his authoritative treatise in Russian on international law of civilized nations, published in 1882–83, fifth edition in 1904–5, which has been translated into several languages, and *Recueil des traités et conventions conclus par la Russie avec les Puissances étrangères*, 1874–1909, 15 volumes. "*Le Tribunal d'Arbitrage de Paris et la Mer territoriale*" was published in the *Revue générale de droit international public* for 1894, vol. 1.

VON MARTENS, GEORGE FRIEDRICH. German jurist; born in 1756; died in 1821. He attended the University of Göttingen where he pursued the study of public law and in 1784 became professor of natural and international law. From

1808–1813 he was privy councilor at Cassel; in 1816 royal representative of Hannover to the Federal Council at Frankfurt, a. M. His two most famous works are: *Précis du droit des gens moderne* and *Reccuil des traités*, both of which assure him a foremost place as an authority on international law. Other publications are: *Cours diplomatique, ou tableau des relations extérieures des puissances de l'Europe*; 25. *Erzählungen merkwürdiger Fälle des neueren europäischen Völkerrechts in einer praktischen Sammlung von Staatsschriften aller Art, etc.*; *Grundriss des Handelsrechtes, insbesondere des Wechsel und Seerechtes*, Göttingen, 1797; third edition 1820.

MOLLOY, CHARLES. English legal writer; born 1646; died 1690. He was a compiler of an extensive treatise on maritime law and commerce, entitled *De jure maritimo et navali* (1676; eighth edition, 1744). This book was the standard work on the subject for many years. One other notable book from his pen was *Holland's Ingratitude, or a Serious Expostulation with the Dutch* (1666).

NUGER, ANTOINE LOUIS. This author's only book, *Des droits de l'État sur la mer territoriale*, 1887, was written as a doctor's dissertation. It is cited with approval by many writers on international law.

NYS, ERNEST. Contemporary Belgian publicist; born 1851; professor of international law at the University of Brussels; member of the Institute of International Law; member of the permanent court of arbitration; counselor of the Court of Appeals, and associate editor of the *Revue de droit international*. He has published numerous works on international and political law, among which may be mentioned: *Le droit de la guerre et les précurseurs de Grotius*, 1882, and *Les origines du droit international et de droit politique*, 1894, and *Le droit international*, 1904–1906. The Anglo-American interpretation of international law by courts and jurists has been one of his special fields of study.

DE OLIVART, MARQUIS DE RAMÓN DE DALMAU Y. Contemporary Spanish publicist; member of the Institute of International Law; advocate in Madrid. The following are his most important works: *Bibliographie du droit international*, second edition, 1905–1910; *La cuestion catalana ante el derecho internacional*, 1909; *Tratado de derecho internacional público*, fourth edition, 1903. He is also the editor of the *Revista de derecho internacional y politica exterior*.

OPPENHEIM, HEINRICH BERNHARD. German publicist and political economist; born in 1819; died in 1880; student of law and lecturer at the University of Heidelberg in 1841. In 1848 he edited, with Arnold Ruge, in Berlin *Die Reform*, and as a consequence was a fugitive for eleven years in Switzerland, France, and England. Among his works may be cited: *System des Völkerrechts*, second edition, 1866; *Philosophie des Rechts and der Gesellschaft*, 1850; *Vermischte Schriften aus bewegter Zeit*, 1866–1869; *Die Deutschen Jahrbücher für Politik und Literatur* (1861–1864, 13 volumes); *Über Armenpflege und Heimatsrecht*, 1870; *Der Kathersozialismus*, 1872; *Waldeck, der Führer der preussischen Demokratie*, 1873.

OPPENHEIM, LASSA FRANCIS LAWRENCE. Born in Germany in 1858; attended the Universities of Göttingen, Heidelberg, Berlin, and Leipzig; lecturer at Freiburg; professor in the University of Basle; became a naturalized English citizen in 1900; since 1908 Whewell professor of international law in the

University of Cambridge; honorary member of the *Real Academia de Jurisprudencia*, Madrid; member of the Institute of International Law; corresponding member of the American Institute of International Law; editor of the Series, *Contributions to International Law and Diplomacy*. This author is a prolific writer in German as well as in English. Among his English publications are: *International Law*, 1905-6, second edition, 1912; *The Science of International Law*, 1908; *The Future of International Law*, 1911; *The Panama Canal Conflict*, 1913; *The Collected Papers of John Westlake on Public International Law*, 1914.

ORTOLAN, JEAN FÉLICITÉ THÉODORE. A French naval officer; born in 1808; died in 1874. His work, *Règles internationales et Diplomatique de la Mer*, second edition, Paris, 1853, is a standard authority in international maritime law.

PERELS, FERDINAND PAUL. German publicist; born in 1836; died in 1903; legal adviser to the admiralty, 1877; privy councillor, 1900; honorary professor at the University of Berlin, doctor of law, member of the Institute of International Law. Perels devoted himself especially to the study of public maritime law; occupied a high position in the administration of the German Navy, and in 1892 was elected to the Reichstag. His principal publications are: *Das internationale öffentliche Seerecht der Gegenwart*, 1882, second edition, 1903; and *Handbuch des allgemeinen öffentlichen Seerechts im Deutschen Reiche*, 1884. The former has been translated into French by F. Arendt, under the title, *Manuel de droit maritime international* (Paris, 1884).

PHILLIMORE, SIR ROBERT JOSEPH. A distinguished English jurist; born in 1810; died in 1885; honorary member of the Institute of International Law. He was educated at Westminster and Christ Church, Oxford; acquired a large practice at the bar; was a member of Parliament; held successively offices as advocate general in admiralty, judge of the High Court of Admiralty and of the Arches Court of Canterbury, judge advocate general; and was also made master of the faculties. The most valuable of his numerous works are *Commentaries upon International Law*, third edition, 1879, and *The Ecclesiastical Law of the Church of England*.

PIÉDELIÈVRE, ROBERT. Born in 1859 at St. Germain; professor of international law at the University of Rennes. He is a frequent contributor to international law periodicals and is considered an authority on international law. His principal work is the *Précis de droit international public ou droit des gens*, Paris, 1894.

PRADIER-FODÉRÉ, P. French publicist; born in 1826; died in 1904; member of the Institute of International Law. His chief work in the domain of international law is his elaborate *Traité de Droit International Public Européen et Américain*, 1895-1906, 8 volumes. Mr. Pradier-Fodéré spent a number of years in South America and became very familiar with Latin American conditions. His work, as the title shows, considers international law both from the European and American standpoint, and is highly regarded on the Continent and in Latin America. He also published an annotated edition of Vattel, 1863, a French translation of Grotius' *De jure belli ac pacis*, 1867, and *Cours de droit diplomatique*, 1880.

RÆSTAD, ARNOLD CHRISTOPHER. Contemporary Norwegian publicist; born 1878. His most important works are: *Kongens Strømme*, 1912; *La mer territoriale*, 1913; *Handels politik*, 1914; and *Krigs og freds problemer*, third edition, 1916.

RALSTON, JACKSON HARVEY. An American lawyer; born in California in 1857; in law practice since 1878; American agent and counsel in the case of the Pious Fund of the Californias against Mexico, the first dispute submitted to the Permanent Court of Arbitration at The Hague under the Hague Peace Convention of 1899; also named by the United States, in 1903, as umpire for the Italian claims against Venezuela before the mixed tribunal at Caracas. He edited the proceedings of all mixed commissions at Caracas in a volume entitled *Venezuelan Arbitration of 1903*; also the report of *French-Venezuelan Mixed Claims Commission of 1910*. He is the author of *International Arbitral Law and Procedure*, 1909.

RIVIER, ALPHONSE. Swiss publicist; born in 1835; died in 1898; consul general of Switzerland in Brussels; professor of international law in the University of Brussels; member of the Institute of International Law. Professor Rivier is known in international law for two treatises: *Lehrbuch des Völkerrechts*, first edition, 1889; second edition, 1899; *Principes du droit des gens*, 1896. He is universally regarded as a masterly expounder of modern international law.

SCHMALZ, THEODOR ANTON HEINRICH. German publicist; born in 1760; died in 1831; professor of law at Königsberg and Halle; in 1810 member of the Upper Court of Appeals and professor of jurisprudence at the University of Berlin. He is the author of a great number of books on public, private, natural and international law, which include: *Das Recht der Kriegseroberung, Annalen der Politik*, Berlin, 1809, and *Das Europäische Völkerrecht*, Berlin, 1817. The latter book has been translated into French, by Count Léopold de Bohm, under the title *Le droit des gens européen*, Paris, 1823.

SCHÜCKING, WALTHER MAX ADRIAN. German contemporary publicist; born in 1875; doctor of law; member of the Institute of International Law; privatdozent at Göttingen; assistant professor of law at Breslau, 1900, and full professor of public law in Marburg, 1903. Among his numerous works may be mentioned: *Das Küstenmeer im internationalen Rechte*, 1897; *Die Verwendung von Minen im Seekrieg*, in Niemeyers Zeitschrift, vol. 14, and *Der Staatenverband der Haager Konferenzen*, 1912, of which an English translation by Charles G. Fenwick (*The International Union of the Hague Conferences*) was published in 1918.

TAYLOR, HANNIS. A distinguished American lawyer; born in 1851; United States minister to Spain, 1893-1897; special counsel for the United States Government before the Spanish Treaty Claims Commission of 1902; counsel for the United States before the Alaska Boundary Commission of 1903; honored by the Institute of France; now in general practice at Washington. His legal writings include: *A treatise on International Public Law*, 1901; *Jurisdiction and Procedure of the Supreme Court of the United States*; *The Science of Jurisprudence*, 1908; *The Origin and Growth of the American Constitution*, and *Due Process of Law*, 1916.

TESTA, CARLOS. Born in Lisbon, 1823; professor at the naval school at Lisbon. The only work of importance which this author has written is *Le droit public international maritime*, Paris, 1886.

TWISS, SIR TRAVERS. English jurist and publicist; born in 1809; died in 1897; professor at the University of Oxford; member of the Institute of International Law. In 1840 he was called to the bar at Lincoln's

Inn and became an advocate at Doctors' Commons. During his very successful legal career he enjoyed a large practice in the ecclesiastical courts, holding many positions incidental thereto; was professor of international law at King's College, London; queen's counsel, advocate general to the admiralty, and queen's advocate general. He also served upon a great number of royal commissions dealing with such matters as marriage law, neutrality, naturalization and allegiance, and was invited by the King of the Belgians to draw up the constitution of the Kongo Free State.

Among the more notable of his numerous publications are: *The Law of Nations Considered as Independent Political Communities*; *The Rights and Duties of Nations in Time of Peace*, 1861, second edition, 1884; and *The Rights and Duties of Nations in Time of War*, 1863, second edition, 1875, both of which works appeared in French in 1887.

DE VATTEL, EMMERIC. A Swiss jurist and publicist; born in 1714; died in 1767; studied at Basel and Geneva; representative of Augustus of Saxony and Poland at Berne from 1746-58. He wrote: *Loisirs philosophiques*, 1747; *Mélanges de littérature, de morale et de politique*, 1757, and also his work *Droit des gens, ou Principes de la loi naturelle*, etc., 1758, for which he is justly famous. The work was translated into numerous foreign languages and is still of great value. An English translation, under the title, *The Law of Nations, or the Principles of Natural Law applied to the Conduct and to the Affairs of Nations and of Sovereigns*, was made by Charles G. Fenwick for the classics of International Law, Washington, 1916.

WESTLAKE, JOHN. An English legal scholar; born in 1828; died in 1913; honorary member of the Institute of International Law; fellow of Trinity College, Cambridge; professor of international law in the University of Cambridge; member for Great Britain of the International Court of Arbitration at The Hague in 1899. His publications include: *A Treatise on Private International Law*, third edition 1890; and *Chapters on the Principles of International Law*, 1894; *International Law*, 1904-1907; second edition, 1910-1913.

WHEATON, HENRY. An American lawyer, diplomat, and publicist; born in 1785; died in 1848. Mr. Wheaton practiced law in the City of New York and was reporter of the United States Supreme Court. The *Reports* published by him in twelve volumes are of exceptional value. In 1825 he was appointed member of the commission to revise the statute law of New York; was sent as chargé d'affaires to Denmark in 1827; was appointed minister resident to the Court of Prussia, and from 1837 to 1846 was minister plenipotentiary there. A treaty negotiated by him in 1844 formed the basis upon which future German treaties were drawn up. His best work is the *Elements of International Law*. It has been published in many editions in America, and translated into French, Chinese, and Japanese. The eighth edition, edited with notes by Richard Henry Dana, jr., was published in Boston in 1866. Among his other publications are: *A Digest of the Decisions of Supreme Court of the United States from Its Establishment in 1789 to 1820, 1820-29*; *Histoire du progrès des gens en Europe depuis la paix de Westphalie jusqu'au congrès de Vienne, avec un précis historique du droit des gens européens avant la paix de Westphalie*, 1841, and *An Enquiry into the Validity of the British Claim to a Right of Visitation and Search of American Vessels suspected to be engaged in the Slave Trade*, 1842.

PART I.

VIEWS OF REPRESENTATIVE PUBLICISTS.

EXTRACTS FROM WORKS ON INTERNATIONAL LAW CONCERNING THE EXTENT OF THE MARGINAL SEA.

AZUNI: *Droit Maritime de l'Europe.* Paris, 1805.

Page 254, § 17.—It is already established among polished nations that in places where the land by its curve forms a bay or a gulf we must suppose a line to be drawn from one point of the inclosing land to the other or along the small islands which extend beyond the headlands of the bay, and that the whole of this bay or gulf is to be considered as territorial sea, even though the center may be in some places at a greater distance than 3 miles from either shore.

BARCLAY: *Problems of International Practice and Diplomacy.*
Boston, 1907.

ASSIMILATION OF PRACTICE RELATING TO TERRITORIAL WATERS.

Page 109.—No branch of International Law is in a more unsatisfactory condition than that of the rights and duties arising out of the possession and user of the margin of sea, along the coast-line of States, called "territorial waters." No general understanding has yet been arrived at on such an essential matter as the width of the margin, and even the nature of the dominion the adjacent State is entitled to exercise is still the subject of controversy.¹

In the *Franconia Case* (*R. v. Keyn*, 1876, 2 Ex. D. 63, and 46 L. J. Rep. M. C. 17), the Court for the Consideration of Crown Cases Reserved held by a majority of seven against six, that the Central Criminal Court had no jurisdiction to try offenses by foreigners on board foreign ships though committed within the limit of 3 miles from the shore. This decision led to the adoption of the Territorial Waters Jurisdiction Act (41 and 42 Vict., c. 73, 1878), by which it was enacted that an offense committed by any person on the open sea within the territorial waters of Her Majesty's dominions, although committed

¹ A question which might be raised in circumstances which have not yet arisen is the extent of the sovereignty of the adjacent State in case of tunnelling beneath the sea. The analogies are favorable to the recognition of the right of the adjacent State to exercise its sovereignty under the sea-bed to the point at which it meets another State equidistant from the coast. The nearest analogy is the case of rivers over which adjacent States exercise jurisdiction to any equidistant dividing line (*Thalweg*). See the present writer, "Channel Tunnel," *Westminster Review*, Feb. 1907.

on board or by means of a foreign ship, was within the British jurisdiction.¹

This enactment has been much criticized by foreign jurists as involving a claim to jurisdiction over passing vessels not consistent with the actual practice of nations.

As regards the 3 miles' margin which England, France, and the United States are agreed to respect among themselves, several other States, including Germany, have never agreed to consider it as finally settled for purposes of general jurisdiction, although the international Fisheries Convention of May 6, 1882, has adopted the limit as among the States, except Norway, bordering on the North Sea for fishery purposes.² A British Fisheries Commission in 1893 reported, after a long inquiry as regards the preservation of fish on the coast of Great Britain, that the present territorial limit of 3 miles was insufficient, and that for fishery purposes this limit should be extended, provided such extension could be "effected upon an international basis, and with due regard to the interests and rights of all nations." No attempt has been made by the British Government to carry out this recommendation. It must not be forgotten that any broadening of the national margin would mean a corresponding curtailment of the international fishing area.³ The subject had already attracted the attention of English jurists, and, at the Lon-

¹ Lord Halsbury, who passed the Act through the House of Commons, speaking of it on May 6, 1895, observed "that care was taken at the time to avoid measurements. The distance was left at such limit as was necessary for the defense of the Realm. Then the exact limit was given for the particular purpose in view."

² In the discussion of May 6, 1895, on the Sea Fisheries Regulation (Scotland) Bill (afterwards 58, 59 Vict. ch. 42, see Appendices) Lord Salisbury (not then in office) observed:

"As long as the coast is open there is no doubt that 3 miles is the limit of territorial waters, but when the coast is folded and doubled as it is in parts of Scotland, there come in a different set of traditions which belong to diplomatic law, and I may say that it is an unsettled question in international law how far the territorial waters extend. The discussion we have had in regard to Newfoundland, the Behring Sea and to other parts of the world, show that when the coast is not straight, but makes an angle, there the limit of the territorial waters is not so fixed. . . . Lord Chancellor Herschell, on the other hand, stated that he was far from saying that 3 miles was to be limit of territorial waters for all time. . . . As regards bays, see an interesting paper by Mr. A. H. Chartells, of the University of Glasgow, read at the Berlin (October, 1906) meeting of the International Law Association.

The decision of the High Court of Justiciary of Scotland in *Mortensen v. Peters* (July 20, 1906) has raised the question of whether an Act of Parliament, conferring jurisdiction over any of the (under international law) high sea, is binding on non-British persons. The Court held that effect had to be given to the exact terms of the Act (Sea Fisheries Regulation (Scotland) Act, 1895)—that distinctions could not be made which were not made in the Act itself. Comp. Lord Chancellor Halsbury's observations in *Cook v. Sprigg* (1899). In the judgment in *Mortensen v. Peters*, Lord Kyllachy observed: "There is certainly nothing in the Convention which in the least conflicts with the right of the several contracting nations to impose, each of them within its territorial limits (whatever these are), restrictions universally applicable against injurious practices or modes of fishing, such as are by this statute and by-law imposed here."

The case in question, it may be mentioned, "concerned a Norwegian trawler, or rather one of a fleet of trawlers maintained by English capital, but registered in Norway to evade the statute and enable them to fish habitually in the Moray Firth." "Foreign Trawlers and Territorial Waters," *Blackwood*, March, 1907, p. 431.

³ See p. 6 note.

don meeting in 1887 of the Association for the Reform and Codification of the Law of Nations (now the International Law Association), a committee was appointed to make a full inquiry into the subject. The year following the Institute of International Law also took up the subject. Both bodies¹ published exhaustive reports on evidence obtained as to prevailing usages in all parts of the world. The inquiries of these two bodies resulted in the adoption in 1894 of a number of rules, drafted by the present writer, first by the Institute and, later on in the same year, by the association. The rules adopted were brought by the Dutch Government, in 1896, to the knowledge of the leading European Governments, who were at the same time sounded as to holding a conference for the purpose of dealing with the question officially. The correspondence was afterwards published by the Dutch Government. The refusal of Lord Salisbury, then Foreign Secretary, resulted in the matter being dropped. In 1903 (March 12), Mr. J. W. Crombie asked Lord Cranborne, Under Secretary of State for Foreign Affairs, in the House of Commons, "whether he was aware that the Dutch Government some four years ago brought to the notice of His Majesty's Government certain resolutions passed by the Institute of International Law, and confirmed by the International Law Association, of which the Lord Chief Justice is president, and proposed to call a conference of European Powers to reconsider the existing rules applicable to the limits of territorial waters for fishing purposes, and, seeing it was owing to the refusal of His Majesty's Government to take part in it that the conference fell through, whether he would now reconsider the advisability of promoting this conference."

Lord Cranborne answered:

No such proposals were made at the time mentioned. But in 1895 the Dutch Government consulted Great Britain and other maritime Powers on the expediency of calling together a conference for the purpose of determining in a uniform manner for all nations the distance of the limit of territorial waters from the shore. The limit was not to be discussed only with reference to fisheries. His Majesty's Government, and, we believe, other Governments concerned, were of opinion that no advantage would be gained by opening such a discussion, and, as far as I am aware, nothing has since occurred to modify that opinion.

¹ The present writer was convener of both commissions. His reports on the subject will be found in the *Annuaire de l'Institut de Droit International* for the years 1892 and 1894 and in the report of the *International Law Association* for 1894. A further and exhaustive monograph by him, bringing the subject down to 1903, will be found in the proceedings of the *Association Internationale de la Marine*. The grounds of the distinction, adopted by both the Institute and the Association of International Law, between the limits of territorial waters necessary for the purposes of neutrality and rights of defense and those requisite for fishery purposes, proposed by the Convener, are fully set out in these reports. See *post*, pp. 109 and 170.

See also an excellent treatise on the subject of territorial waters generally, Prof. Stoerk in Holtzendorff's *Handbuch des Völkerrechts*.

The answer given by Lord Cranborne was correct in so far as that there was no proposal to limit the discussion to fisheries, but it is not quite correct in its assumption that other Governments were of the same opinion as the British Government. The replies of other Governments were shortly as follows: The United States Government was not disinclined to adhere, if a number of other Powers also adhered. The German Government thought that the question was not yet ripe to be settled by an International Convention, but was disposed to deal with existing difficulties by separate arrangements. The Russian Government was favorable to the proposal, and promised to attend the conference if the principal maritime Powers accepted the invitation also. The answer of the Spanish Government was practically the same, and the Portuguese Government accepted unconditionally.

It is true that the Dutch Government placed the matter before the Governments of Europe in a way that seemed to pledge them to accept an extension of the width of the margin from 3 to 6 miles, and Lord Salisbury's objection may have been chiefly to this widening of the zone.

New considerations have arisen out of the Russo-Japanese war, especially in connection with the laying of floating mines and mine fields; and the distinction made in the Institute and Association rules between the zone necessary for the protection of fishery rights and that necessary in time of war for the protection of the neutral coastline and coast traffic, seems to have been amply justified by subsequent events.

As regards fishery rights, on the other hand, a great difference of views still prevails. With both Norway and Spain, diplomatic difficulties may any day result from both of these countries claiming jurisdiction over a larger margin of coast waters than the ordinary 3 miles. English trawlers fishing within the Spanish 6-mile limit expose themselves under Spanish law to penalties; this has already, it seems, given rise to trouble.

The question of revising the limits fixed for territorial waters in the Convention of 1882 (*see above*) was the subject of an animated discussion at the recent conference at Hull of the National Sea Fisheries Protection Association (Sept. 18, 19, and 20, 1906), when a resolution was adopted in favor of maintaining the present 3-mile limit on grounds of expediency, which deserve serious consideration.¹

¹ Mr. C. Hellyer of Hull, who moved the resolution, produced tables of figures showing that a 13-mile limit would exclude British vessels from an area of over 135,000 nautical square miles of the fishing grounds of Western Europe, *i. e.*, from an area nearly equivalent in size to the trawlable area of the North Sea, or nearly one-third of the total area available for trawling (*ex* White Sea or Baltic). A 9-mile limit would exclude them from over 80,000 nautical square miles. As the British steam trawling fleet is more than six

It seems practically impossible to regulate fishery rights in accordance with any uniform limits. The necessities of preservation of the fish supply justify a claim to the exercise of jurisdiction by adjacent States over areas which differ so widely that even to fix any reasonable maximum distance from low-water mark would not meet all cases.

[Here follow the resolutions of the Institute of International Law. See *post*, p. 148.]

times greater than that of all other countries combined, the subject can not be disposed of as involving legal principles only.

The subject is, however, far from exhausted with the claims of the trawling industry, as the following passages from an interesting article by an apparently highly competent correspondent in the *Standard* of April 9, 1907, show: "During the spring of the present year there has been a recrudescence of the old grievance on the part of British fishermen against alien trawlers. The agitation has assumed proportions never before approached. The starting point of this outcry was an incident which occurred off Start Point on the evening of March 2 last. The Plymouth fishing boat *Shamrock* was riding to her nets upon the mackerel grounds. A French steam trawler was seen approaching, and, although the English boat was showing her regulation lights, the steam vessel continued holding her course. . . . The Frenchman came sweeping past within musket shot, dragging his trawl right athwart the Plymouth boat's gear. Her number and port of registry were carefully concealed by a corner of sail thrown over the lettering. The wire rope by which steam trawlers drag their nets cut through the *Shamrock's* riding rope, the whole wall of her meshes was carried away by the foreign trawler, and her skipper returned to Plymouth a ruined man for the rest of the fishing season. I boarded the vessel myself the following morning, and can vouch for the absolute accuracy of the narrative. I have spoken of this incident as the starting point, but it would be, perhaps, more correct to term it the culminating point in a long series of similar acts of depredation. At the time of its occurrence there were known to be no fewer than 150 alien steam trawlers upon the mackerel grounds between Dartmouth and Eddystone. It may be explained that *these boats were fishing well outside the 3-mile limit*, and that, consequently, by all the laws of freedom of the sea, they had as much right there as our own fishers. . . . The great industry of sea fishing may be broadly classed under two heads, trawling and drifting. In the first of these the vessel drags her nets, fashioned like a great purse, over the ground, and picks up all the prime fish of the ocean. In the second case the vessel shoots her nets, which are buoyed along the upper ridge and weighted at the lower, so as to float perpendicularly and form a solid wall of meshes in the water. At one end of this network barrier rides the boat; to the other end, which may be a mile and a half away, is attached a dan or buoy. The drift nets catch fish which swim near the surface in schools, thus evading the bottom trawl, and include mackerel, herrings, pilchards, and sprats. *It is an unwritten international law that trawlers shall trawl by day, and that drifters shall drift by night, so that there shall be no conflict between the two methods.* For it stands to reason that if a powerful trawler came dragging her heavy gear right through a fleet of drift boats she would ruin a whole 'village' in a single night. The alien trawlers have not respected this rule, hence the trouble. They are seeking the same species of fish as the drifters, which they catch in 'flying trawls,' or trawls poised to drag through the water at a little distance beneath the surface. . . . To increase the coastal patrol would be but a half measure. There is no use in establishing a complete and effectual guard without defining exactly the terms upon which it may exercise its authority. And before this can be done *certain moot points require to be resolved into specific acts of international law.* Chief amongst these is the question of the legitimacy of trawling by night upon the drift fishery grounds. Usage is not a sufficiently definite sanction. . . . Unless practical action is speedily taken, an important and most deserving industry, which, after all, is really national in its importance, will have been crushed out of existence by the unchecked exercise of a species of rivalry which disregards all the limitations of fair competition in the pursuit of its end."

BLUNTSCHLI: Le Droit International Codifié. Fifth Revised Edition. Paris, 1895.

§ 302.—When the open sea forms the frontier of a State we include within the national territory that part of the sea over which the State from the shore can enforce its power—that is, a strip of sea extending up to the range of a cannon shot from the shore.

International treaties or municipal laws may fix other more definite limits, such as a geographical mile or 3 English miles from the coast at low-water mark.

(1) Sovereignty applied to the sea is necessarily incomplete for the sea can not be a part of any State. The exercise of this sovereignty over the adjacent sea has increased notably since the invention of long-range cannon. This is a result of perfecting of the means of defense used by the State. The sovereignty of States over the sea originally extended a stone's throw from the shore, subsequently to an arrow shot; firearms were then invented, and by rapid progress we have arrived at the long-range cannon of to-day, but the principle has still been retained—"dominion over the territory ends where the force of arms ends," "all that which may be controlled from the land."

(2) The distance of 3 English miles, or a geographical mile, from low-water mark was fixed by Article 1 of the treaty of October 20, 1818, between Great Britain and the United States, and by Articles 9 and 10 of the treaty between Great Britain and France of 1839.

(3) Now cannon may have a range of 5 English miles, the question has been asked whether the distance of 3 miles is not too small. See the note addressed by Mr. Seward, October 16, 1864, to the British Legation at Washington.

The perfecting of cannon is of importance for the defense of the country and has no effect upon the utilization of the territorial waters for fishing, oyster beds, etc. In this respect we must consider the distance of a geographical mile, 3 English miles, as continuing to exercise its effect and the extension of the sovereignty of the State over the high seas is not justified. (See Calvo, sec. 201.)

§ 303.—Undoubtedly we must respect the distance of the geographical mile for fishing, police, and military administration. * * *

§ 304.—The sea by its nature can not be made a dependency of any one State. It is open to all nations. The sea is free.

The open sea can not and ought not to be subjected to the sovereignty of one single power or several combined powers.

(1) Certain States sought up to the seventeenth century to assert exclusive sovereignty over certain seas and forbade other nations from entering or fishing there. Spain and Portugal, basing themselves upon a concession from the Pope, arrogated to themselves this right over the seas of the East and West Indies. It was against this abuse that Grotius wrote his celebrated book entitled "*Mare Liberum*," Utrecht, 1609.

The liberty of the seas is to-day recognized by all navigating peoples. The *raison d'être* of the liberty of the seas does not rest upon the fact that it would be impossible to determine frontiers, but that the exclusive and permanent possession by any particular State is not possible, and that, on the contrary, the sea is open to the use and commerce of all nations, and that at the same time the security of States, as well as their interests, would be threatened by the exclusive sovereignty of one State over the sea. (See Calvo, sec. 205.)

§ 305.—International law no longer considers to-day that the sea may be closed to universal commerce when that sea is navigable and is adjacent to the open sea, even though the coast of that sea is part of the territory of a single State.

(1) This rule was not recognized in antiquity. The Phœnicians and Carthaginians considered the Mediterranean as their sea, and the Romans made the same claim later. Denmark for a time made analogous claims over the Baltic. The Republic of Venice claimed exclusive sovereignty over the Adriatic, and Genoa over the Ligurian Sea. Turkey claimed ownership over the Red Sea and the Sea of Marmora. Russia forbade use of the Black Sea to other nations. All these claims finally vanished when public opinion pronounced itself in favor of the liberty of the seas.

§ 307.—The open sea is open to the commerce and fishing rights of all nations and all individuals.

(1) All peoples have the right of navigating in the interests of commerce. Navigation ought also to be free for fishing. States in this respect have no right or privilege for their own fishermen to the detriment of foreign fishermen. The rich treasures of the sea are open to all humanity. The Crown of Denmark, as late as the seventeenth century, assumed the exclusive right of fishing in the waters around Iceland and Greenland, and entered into a conflict with the United Provinces of the Netherlands over this matter. This right, subsequently restricted by Denmark to a zone extending 15 marine miles from the coast, is no longer recognized by other States. In our day conflicts arose on the subject between Great Britain and the United States with reference to fishing in the British waters off Newfoundland. The treaty of October 20, 1818, accorded to American fishermen the full right to fish, except within a zone reserved to British subjects, whose extent was fixed at 3 marine miles from the coast.

§ 309.—Certain parts of the sea are subject to the sovereignty of adjacent States. (a) The strip of sea situated within a cannon shot from the shore, (b) seaports, (c) gulfs, and (d) roadsteads.

Certain parts of the sea are so closely united to the land that they ought, in a certain measure at least, to be considered as a part of the territory of the adjacent State.

They are considered accessories of the land. The security of States and public order are so vitally interested in them that

we can no longer be satisfied in the case of certain gulfs with a zone situated within cannon shot of the shore. We can only invoke an exception to the general rule of the liberty of the seas on serious grounds and when the extent of the bay is small; that is, Hudson Bay and the Gulf of Mexico are clearly a part of the open sea. Nobody contests the sovereignty of England over the arm of the sea which extends between the Isle of Wight and the English coast, which is not admitted for the sea situated between England and Ireland. The English Admiralty, has, however, at times maintained the theory of "narrow seas" and has sought, without success, to appropriate to itself under the name of "Kings Chambers" a considerable extent of sea. The treaty of August 2, 1839, between Great Britain and France on the subject of fishing in the channel establishes, in article 9, that bays less than 10 miles wide are considered as part of the territorial seas. The sovereignty of Turkey over the Dardanelles Strait and the Bosphorus can not be denied.

§ 310.—The adjacent State may, consequently, with respect to the seas above designated, take all appropriate measures which it considers necessary for its security and the preservation of public order and the regulation of fishing and navigation within those waters. But it is not authorized in time of peace to forbid or interfere with the free navigation in the waters dependent upon the land.

1. The adjacent State, in order to prevent contraband commerce, may require foreign ships to approach the coast at certain definite points only. It may, for its safety, forbid the approach to the shore by war vessels. Certain countries also forbid foreign fishermen to carry on their trade in the waters dependent upon their territory. Foreign fishermen do not contest this right, because we can not refuse to a State the right of increasing the fish on its coast. . . .

§ 322.—Ships which navigate along the coast of a State in that part of the sea which is considered the territory of that State are temporarily subject to the sovereignty of that State in the sense that they are bound to respect military and police ordinances promulgated by the latter for the security of its territory and its coast population.

The jurisdiction of the adjacent sea only extends over the littoral sea within the limits considered necessary by the police and military authorities. The ship in all other respects is as free as if it were in the open sea; that is, it is regarded as a floating part of the territory of the State whose flag it flies.

§ 772.—The passage of war vessels in the neutral waters which adjoin the coast is regarded as a violation of neutrality only when the neutral State has forbidden such passage to belligerents.

Indeed, the sovereignty of a State over the adjacent waters is a relative sovereignty since the entire sea is open to the free navigation of all peoples. Consequently neutral States are not under an absolute obligation to prevent the passage of war

vessels although they have the right to do it. Foreign vessels are, however, bound to observe the police and military regulations established with respect to these portions of the sea. (Wheaton Int. Law, sec. 432.)

BONFILS: *Manuel de Droit International Public*. Seventh edition. Paris, 1914.

§ 491, page 322. *The Littoral Sea*.—The *jurisdictional* or *littoral* sea is the strip of the ocean adjacent to the continental or insular territory of a State over which the State may, from the shore washed by the waters of this sea, exercise effective control over it. The territory of the State is prolonged in the great interest of its conservation and defense over this portion of the ocean; hence the denomination of *territorial sea* adopted by the majority of jurists and publicists. We prefer to call it *littoral* or *jurisdictional* sea, this last qualification expressing the legal status of that part of the sea.

What is the extent or width of this littoral sea? Under the influence of diverse theories all the older authors establish various and fantastic standards of measurement. Some writers of the sixteenth century fixed 60 miles as its width. In the eighteenth century Casaregis and Abreu extended it to 100 miles. Loccenius identified it with two days' journey. Sarpi accorded the adjacent State all that it needed; Valin all that portion in which bottom could be found; Rayneval the actual horizon.

With greater reason Grotius and Bynkershoek thought that the portion of the ocean subjected to the jurisdiction and control of the adjacent State ought to end where the force of arms ends. The rule was for the first time definitely formulated by Bynkershoek. Vattel, Bluntschli, Gessner, Hautefeuille, Klüber, Massé, Ortolan, Pradier-Fodéré, Schiatarella, etc., almost all the modern authors, and several diplomatic treaties admit that the extent of the jurisdictional sea is equal to the greatest range of cannon. This is the reasonable standard and the limit of general law, excepting special conventions. The protection of pieces of artillery placed on the shore can not extend beyond it. Beyond that distance projectiles launched from the enemy's ships can not reach the land. . . .

§ 492.—Some States have by special laws or treaties fixed other limits. Thus, in Spain, the width of the territorial sea is 6 miles. (See the Anglo-American treaty of Oct. 20, 1818; Belgian law of June 7, 1832.) Some States, adopting in principle the limit of 3 miles, nevertheless establish a greater extent to that portion of the sea in order to facilitate the enforcement of their customs laws. Thus,

in France, the limit is extended to 2 myriameters; by the treaty signed between France and Mexico, November 27, 1886 (art. 15), it is fixed at 20 kilometers from low-water mark. Great Britain exercises a right of surveillance by its cruisers up to 12 miles. . . .

§ 492.¹—From what exact point shall the territorial zone be calculated? There is some disagreement on this score. Some authors, like Ortolan, say that it shall be calculated from the place at which the sea becomes navigable. This statement is generally rejected. To fix the point of departure we ordinarily take the shore line, but even here there are two methods of calculation. The first method takes low-water mark as the point of departure. This is the common opinion. (See French law, March 1, 1888; Resolutions of the Institute of International Law; Conventions on Fishing.) Others fix it at that point which the highest tide fails to reach.

§ 493.—But the coasts are not regular. There are capes and headlands, peninsulas, bays, creeks, coves, and gulfs of wider or smaller dimension. It is impossible to measure the width of the maritime domain by taking each of these various sinuosities as points of departure. (This is, however, adopted in the arbitral award of Oct. 20, 1903, in the Alaskan Boundary question between the United States and Great Britain.) In practice, for bays and small gulfs, the radius of 3 miles is measured by a straight line drawn across the bay at the point where its shores most closely approach, in which the opening does not exceed 10 miles. (Treaty of The Hague, May 6, 1882, art. 2.)

§ 494.—This strip of sea, the *littoral* sea, may be subjected to the effective control of the adjacent State; it is protected and defended by it. For the adjacent State there exists the evident and undeniable necessity of protecting its coasts, ports, and roadsteads against attack, more sudden and easy to effect than attacks on land. It must have the right of expelling every adversary from that part of the sea and forbidding access to it with the aid of batteries placed on the shore. The exterior security of a maritime State requires that this extent of sea be subjected to its power.

§ 516, page 342. *Gulfs, bays, roadsteads, and ports.*—Doctrine and custom without hesitation place gulfs, bays, roadsteads, and ports, which make indentations into their coasts, within the maritime domain of the State. The possibility of an exclusive possession, of defending their approaches by cross-fire from the shore, the neces-

¹ As to the law of War, Denmark, Norway, and Sweden admit 4 miles; France, 6 miles distant from the base of operations of the fleet (decrees of October 18, 1912, *R. D. I. P.*, vol. 20, Documents, p. 6; of May 26, 1913, *ibid.*, p. 56); Italy and Russia cannon-range; Turkey, 5 miles (declaration issued at the time of its war of 1911 with Italy). Upon the extent of the territorial sea, according to Norwegian law, see *Rapport du 29 février 1912 de la commission* (Norwegian) *de la frontière des eaux territoriales*, Kristiania, 1912 (in French). This report contains also numerous indications of the limits of territorial waters as determined by interior legislation and individual treaties of the different States (pp. 55 et seq.).

sity of looking to its own security—all these reasons combine to justify this practice and this doctrine. The only contested point is with respect to a claim raised by certain States as to great bays and gulfs situated between the headlands of their coasts. Above all, Great Britain made claim to a right of jurisdiction over the encroachments of the sea into the land, called Kings Chambers. The United States made similar claims over the great bays on the coasts of North America. Kent drew an imaginary line of delimitation from the southern part of Florida to the mouth of the Mississippi. The sovereignty of the United States would thus be extended about 180 miles from the shore. With the exception of certain English and American publicists, recent publicists generally are little inclined to recognize these exaggerated claims of sovereignty.

Great Britain also asserted its territorial sovereignty over the straits and great bays which surround Great Britain and Ireland—the seas called the adjoining or narrow seas, such as the Bristol Channel, St. Georges Channel, St. Patricks Channel, and the Irish Sea. These pretensions are not well founded. These waters like those of the Gulf of Lyons in the Mediterranean and the Gulf of Gascogne, Hudson Bay, etc., are a part of the high seas. It is generally admitted that gulfs and bays belong to the State whose land surrounds them when their width does not exceed 10 marine miles.

§ 581, *page 408*.—In the seventeenth century Denmark claimed the exclusive right of fishing in the waters of Iceland and Greenland, which claims were rejected by other States. Several conflicts also arose between Great Britain and the United States with respect to fishing around Canada, as in the Bering Sea question. The question between Great Britain and France with respect to the Newfoundland fisheries does not involve the principle of the liberty of the seas. This is a question of a conventional international servitude. In the open sea the right of fishing belongs to all peoples. No State can unilaterally prescribe rules obligatory in the open sea upon any other than its own subjects. Nevertheless it is indispensable to assure to those plying this trade an effective protection in the security of their operations. International conventions have established certain rules with this result as their object.

§ 582.—. . .

Fishing in territorial waters, fixed at the radius of 3 geographic miles, is expressly and exclusively reserved to nationals. Pradier-Fodéré characterizes this convention as powerless to bring about the suppression of abuses.

Analogous conventions have been concluded between States for the regulation of fishing in their territorial waters. (See the convention between France and Switzerland, Dec. 28, 1880, Mar. 12 and July 30, 1891, amended by convention of Dec. 27, 1899.)

BOUCHER: *Institution au Droit Maritime.* Paris, 1803.

Page 707, section 29, chapter 64.—When the ordinance speaks of a roadstead it means all anchorage places that are at some distance from the coast, where vessels find the bottom, so that they can stay there at anchor; and they ordinarily anchor there when waiting for wind or tide to enter port or to set sail; the roadstead, as is said in line 1, section 13, ff., *de fluminibus, est locus minime portuosus, sed in quo naves in salvo esse et commorari queunt.* But the formalities laid down on this subject should be observed, both as regards French and foreigners, so that if they fail therein they can not complain of being pursued.

VAN BYNKERSHOEK: *De Dominio Maris.* Leyden, 1744.¹

Pages 363–365.—I should think, therefore, that the possession of a maritime belt ought to be regarded as extending just as far as it can be held in subjection to the mainland; for in that way, although it is not navigated perpetually, still the possession acquired by law is properly defended and maintained; for there can be no question that he possesses a thing continuously who so holds it that another can not hold it against his will. Hence we do not concede ownership of a maritime belt any farther out than it can be ruled from the land, and yet we do concede it that far; for there can be no reason for saying that the sea which is under some one man's command and control is any less his than a ditch in his territory.

What sort of power, however, is to be understood in order to have the sea subject to the mainland, is a matter hard to define, because of the danger of the logical sophism which the Greeks call *Σωρίτης*; the smallest is not enough, and of course we do not require the greatest, but a power which can be perceived by the intellect rather than unfolded in words, as Julian² once said of such things as have no definite limit. Hence you may see that the early jurists who ventured to recognize dominion over a maritime belt wander about in great uncertainty in regulating its limits.

Some authorities extend it to a hundred miles, some to sixty; for both classes see Bodin,³ Selden,⁴ and, to add him also, Pacius.⁵ Some extend it to a two days' voyage, as you may learn, if it is worth

¹ This translation of a portion of Chapter 2 of the *De dominio maris* has been taken from a translation of the entire work made by Ralph Van Deman Magoffin from the original Latin text in Bynkershoek's *Opera minora* for publication by the Carnegie Endowment for International Peace in THE CLASSICS OF INTERNATIONAL LAW.

² Digest, 46, 3, 13.

³ *De Republica*, I, c. 10.

⁴ *Mare Clausum*, I, c. 22.

⁵ *De dominio maris Adriatici*, page 22 of my copy.

while, from Hieronymus of Brescia.¹ Others again set various other limits; for these see Gryphiander.² But no one could easily approve the reasoning on which all these rules are based, or that reasoning either by which it is accepted that dominion over the sea extends as far as the eye can reach.

And yet this seems to be also the way it is defined by Philip II, King of the Spains, in the Nautical Laws, which he gave to the Netherlanders on the last day of October, 1563; for there³ foreigners are forbidden to attack their enemies within sight of the land. It is settled, therefore, that the subject sea extends that far. But this also is too loose and variable a rule, or at any rate it is not very definite. For does he mean the longest possible distance a man can see from the land, and that from any land whatever, from a shore, from a citadel, from a city? As far as a man can see with the naked eye? or with the recently invented telescope? As far as the ordinary man can see, or he that has sharp eyesight? Surely not as far as the keenest of sight can see, for in the ancient writers we are told of people who could see all the way from Sicily to Carthage.⁴ And so this rule also is wavering and indefinite.

Wherefore on the whole it seems a better rule that the control of the land [over the sea] extends *as far as cannon will carry*; for that is as far as we seem to have both command and possession. I am speaking, however, of our own times, in which we use those engines of war; otherwise I should have to say in general terms that the control from the land ends where the power of men's weapons ends; for it is this, as we have said, that guarantees possession. This seems to have been the opinion followed by the Estates of the Belgic Confederation who decreed on the third of January, 1671, that the commanders of vessels off the coasts of foreign princes should salute at sea *as far out as cannon will carry* from their cities and forts, according as the prince of the shore in question might prescribe; as for his caring to return the salute, that must be left to him to decide.

CALVO: *Le Droit International Théorique et Pratique*. Fifth edition.
Paris, 1896.

Volume I, page 472, § 350.—The object of the *Mare liberum*, published for the first time in 1609, was to combat the pretensions of the Portuguese to the exclusive control of the Indian Ocean and

¹ *De finibus reg.*, c. VII, n. 12 and 13.

² *De Insulis*, c. XIV, n. 20 f. [Mention is made in no. 22 of Hieron de Mont., c. 7, n. 13.]

³ Tit. I, § 27.

⁴ [Cf. PLINY, *Nat. Hist.*, 7, 21, 85; *solitum autem Punico bello a Lilybaeo Sicillae promontorio, exeunte classe e Carthaginis portu, etiam numerum navium dicere.*—TRANSL.]

of that which washes the west coast of Africa. Grotius examines one by one all the titles on which the court of Lisbon based its claim to this privileged empire. He denies, first of all, the right derived from priority of discovery, the Indies having been known to the Romans, Persians, Arabs, and even the Venetians long before the Portuguese arrived there by way of the Cape. He contests no less the conclusions which they pretended to draw from the celebrated Bull of Alexander VI, as the Pope, in his opinion, had absolutely no authority to legislate in such a matter.

In Chapter V of his work Grotius confines himself to settling the question of the freedom of the seas in general; on this subject he enters into long and subtle discussions of those things which should be in common and those which are susceptible of private ownership. Further on he makes a distinction between the law of ownership and that of protection and jurisdiction, and declares that if ownership is unjust and iniquitous in certain cases, it is barbarous and inhuman with regard to the sea.

"There is here no question," he continues, "of an interior sea of scarcely the width of a river, but of the ocean itself to which antiquity gave the name of *the infinite, the father of things, the limits of heaven*; which feeds by its never-ending vapor, not only springs, rivers, and seas, but the clouds, and according to the belief of the ancients the stars themselves; which, finally, encompassing the earth as it does and penetrating the land with its humidity can not be enclosed or restrained, and which instead of being possessed, is the real possessor." Further on, he proclaims that navigation in the high seas is free to all, without permission from any prince.

In the last chapter of his book Grotius reaches the practical conclusion which he has had in mind, namely, the contention that the Dutch have, as against the Portuguese, the right to carry on commerce freely with the Indies and justifies the legitimacy of a war founded on principles which have for their foundation the freedom of the human race.

§ 351.—The doctrine maintained in the *Mare liberum* was in direct opposition to the pretensions of the British Government to the exclusive sovereignty of the waters which surrounded the coasts of Great Britain. Selden undertook the task of refuting the work of Grotius, and to this end published, in 1635, his *Mare clausum*, which he dedicated to Charles I and in which he endeavored to demonstrate that, in accordance with the natural law and the law of nations, the sea as well as the land may be occupied, and that the King of England has an incontestable right to the exclusive dominion of the sea called the British Sea.

In support of his theory Selden shows vast erudition; history, geography, nautical science, and law each in turn are placed in contribution. He mentions 17 nations of antiquity who were masters of the waters which washed their shores. He cites both the Bull of Pope Alexander VI and the Bull *In coena Domini*, and rejects, as does Grotius, the pretensions of the Portuguese, not as intrinsically illegitimate, but because the King of Portugal had no rights over the seas which he claimed. Selden further on refutes, successfully from a certain point of view, some of the arguments enlarged upon by Grotius in his *Mare liberum*. "The right which foreign vessels have to traverse waters belonging to other nations," says Selden, "resembles similar liabilities sometimes imposed on landed proprietors."

In opposing the objection founded on the impossibility of establishing limits and frontiers, which Grotius puts forward in favor of the freedom of the seas, Selden maintains with reason that parallels and meridians are frontiers as well defined as trenches, walls, or rivers. In this connection the work of Selden is superior to that of Grotius, who, however, at the period in which he wrote, was not qualified pertinently to demonstrate the real bases of the freedom of the seas; for this purpose more extended information and a knowledge of the great progress since realized in economic and social sciences were necessary.

The second book of Selden's work is consecrated to the task of proving the dominion of the King of England over the ocean called British; the book is divided into four parts to correspond with the cardinal points of the globe. Selden argues that the northern and western oceans being of such vast extent that one reaches as far as America and the other extends beyond Greenland and Iceland to regions then completely unknown, they could not, throughout their entire length, be called the British Ocean; "but," he says, "even beyond the limits where this name is lost, the King of Great Britain possesses over the one and the other the most extensive rights, which it is not permitted to limit."

The following are the terms in which Selden justifies the pretensions of England to the exclusive dominion of the British Ocean:

Since the coming in of the Normans there is frequent mention of a guard or government instituted for the defense and guarding of the sea. The commissions of the English admirals, by using the expression *governor general over all our fleets and seas*, prove clearly that England is the proprietor of some of these seas.

The commissions of French admirals and the titles emanating therefrom do not signify any dominion of one having command over the seas; these admirals had jurisdiction only over

their naval forces together with the government of the seamen and jurisdiction over their persons and movables.

It is generally known that after King John and Henry the Third were driven out of Normandy itself, the islands of Jersey and Guernsey and some other neighboring isles lying near the shores of Normandie and Bretagne continued to remain in the Dominion of England: a proof that the occupation of the sea was part of the patrimony of the kingdom.

Though our Henry the Third renounced his claim to no small part of Aquitaine, yet the isle lying before it, called Oleron, he granted to his eldest son Edward to be held in time to come as a perpetual appendant of the English Crown. And although after a while, both this and some other neighboring isles did many ages since, for diverse reasons, follow the fate of those French shores which lie next to them, yet in the mean time the Dominion of the Sea remained entire, as it did before, to the Kings of England.

The Kings of Sweden and Denmark thought themselves obliged to ask of Queen Elizabeth permission, which was refused them, for free passage for their ships through the English Sea with provisions for Spain. It is evident that these sovereigns would not have addressed such a petition to the Queen of England if they had been able to contest her right to the dominion of these seas. The French themselves were accustomed to ask the King of England for permission to fish for soles which they afterwards sent to their King, Henry IV, and some of their ships were seized for fishing without permission.

We can not pass by in silence the sea which extends far to the North and which washes the shores of Finland, Iceland, and other islands belonging to Denmark and Norway, because this sea, in the opinion of a great number of persons, belongs to the English.

The author of the *Mare clausum* endeavors to prove in the same way the right of the King of Great Britain to the sovereignty of the sea lying north of the island—that is to say, as far as Greenland, by showing that several English merchants of the Muscovite Company were the first to pass through this sea long before it was used and frequented by whale fishers.

He ends by saying that after all this testimony it can not be doubted that the ports and coasts of neighboring nations form, at the south and west, the limits of the British Empire, a maritime empire par excellence, but that these limits in the vast middle and western ocean, in which are situated England, Scotland, and Ireland, are still to be defined.

The theories of Selden's book, as was to be anticipated, were accepted fully by the British Government: Charles I sent a notification of them to the States-General; the Long Parliament had them translated into English with a commentary, and to give them still

greater force, it declared war against Holland; finally, William III, in his manifesto of May 27, 1689, addressed a complaint to Louis XIV for having tolerated the violation by his subjects of the rights of sovereignty of the British Crown over the British Sea.

The work of Grotius, from the point of view of knowledge and method, is perhaps inferior to that of Selden; but it has the incontestable merit of having proclaimed the freedom of the seas and of having entered directly into the spirit of modern civilization. On the other hand, Selden, though a better logician, less empirical and more profound than his antagonist, has caused results quite contrary to those which he had in view: for by encouraging England to persevere in her tendencies to exclusiveness and universal domination, he finally provoked a reaction favorable to the ideas of Grotius, to whom the world owes one of its most precious moral conquests. To sum up: If the author of the *Mare liberum* occupies only the second place in the discussion, one can not deny his right to the gratitude of posterity for having courageously defended the principles of equity and sane reason, and for having shown the way to others, who, walking in his footsteps, would one day establish on its real foundations the doctrine of free passage through the seas.

§ 352.—Two centuries have hardly elapsed since the publication of Selden's work, and the principle of the liberty of the seas, so opposed by England, has emerged from the field of theoretic discussion to enter triumphally into the practical dominion of all nations. To-day the public external law of Europe, as well as that of America, recognizes equally the fact that no nation possesses the exclusive right to the high seas; that the flags of all nations enjoy the same rights and liberties, on condition that they respect the general principles of the law of nations; that naval superiority does not entitle any state to preeminence over other states; that the violation of these rules, no matter from whence it may emanate, is always illegitimate and blameworthy; and finally, that exceptional measures of supervision or police, agreed to under special treaties relative to ships of one, two, or several nations, are only obligatory on the contracting parties.

§ 353.—The real extent of the maritime boundaries of a country is a question the importance of which can not be underestimated, involving as it does the safety even of the state, and for the reason that the coast line is more exposed to sudden and unforeseen attacks than are boundaries on land.

The natural limit of a state on the coast is defined by the contour of its shores where they are washed by the tide and where the maritime dominion begins. In order to facilitate the defense of the coast, the general practice of nations sanctioned by numerous treaties has been to trace, at a certain distance from the land, an imaginary line which is considered to form the extreme limit of the maritime frontier of each country. All the space within this line comes, *ipso facto*,

under the jurisdiction of the state to which it belongs, and the sea between this line and the shore is called *territorial sea*.

§ 354.—The words “shores and banks” refer to all the land along the seacoast, though it may not be sufficiently solid to admit of being inhabited, but not to the land which is constantly under water. Sir W. Scott, a celebrated judge of the British Court of Admiralty, takes advantage of this definition in the case of a prize seized at the mouth of the Mississippi. There exist at this point a large number of islands formed of mud and trunks of trees which seem to be a part of the mainland, though they change continually in form and sometimes of place. The captors pretended that these islands did not belong to the American continent, that they were *nullius*, that they did not admit of being permanently inhabited, that they were scarcely even visited at long intervals by hunters, and, finally, that the territory of the United States began at Fort Basil, a fort constructed by the Spaniards at the real entrance to the river; but Sir W. Scott vacated the seizure by deciding that these islands were under the jurisdiction of the United States, as they were composed of *detritus* from the mainland, and that there should be applied to them the rule of Roman law on which is founded the doctrine which we are defending and which, in brief, is as follows: *Quod vis fluminis de tuo prædio detraxerit et vicino prædio attulerit, palam tuum remanet*.

§ 355.—Publicists are far from agreeing as to the extent to be assigned to the territorial waters.

Grotius incloses them in a space which may be defended from the land with the resources known to military art. Bynkershoek, who is of the same opinion, as follows: *Terræ potestas finitur ubi finitur armorum vis*. Hautefeuille also inclines to this doctrine, though he thinks that in smaller bays and gulfs the line of demarcation should lie from promontory to promontory. Valin looks to nature itself for the foundation of the maritime frontiers of States. According to him the entire extent of adjacent waters the bottom of which may be reached by sounding should be considered as the territorial waters of the nation owning the neighboring coasts. The theory is incapable of practical application as it is based on terms having only a relative value. What is in reality the bottom of the sea? What is the *minimum* depth which may serve for demarcation? On an abrupt coast line hewn sharply by nature itself the bottom is deeper than on level shores or those which have a slight incline; on certain coasts the true bottom or bed of the sea is found only at a distance of 30 or 40 leagues from the shore; on others it adjoins the coast. In a system like that of Valin's, the extent of territorial

waters would have no uniformity and would become either too great or too small to answer the ends for which it was conceived.

Rayneval thinks that the distance to which a cannon ball can be projected is too restricted to serve as a measure for the limit of territorial waters; he thinks that the radius should be extended as far from the shore as the eye can reach; that is, to the real horizon. This last principle is not less arbitrary and impracticable than that maintained by Valin, for it subordinates everything to the physical and material conditions in which the observer may find himself.

§ 356.—In order to reach a practical solution of the question, one must first of all not lose sight of the fact that States have no property rights over territorial waters, but only the right of supervision and jurisdiction in the interest of their own defense, and for the protection of their financial interests. The nature of things, then, demands that this right should extend to the point where its existence is justified, and that it should end where the fear of serious danger, practical utility, and the possibility of insuring effective defensive action ceases.

From these general principles it is easy to draw the conclusion that territorial waters should include only the space capable of being defended from the main land, or of serving as a base for attacks on the adjacent coast. Since the invention of firearms this space has generally been limited to 3 nautical miles from the shore line at low tide. In this zone the exercise of territorial jurisdiction is absolute, uncontested, and exclusive of the rights of all other nations.

Such is the limit which has been generally recognized by international conventions, notably by article 1 of the treaty of October 20, 1818, between England and the United States of America; by the Belgian law of June 7, 1832; by articles 9 and 10 of the treaty of August 2, 1839, and by Article 1 of that of November 11, 1867, between France and England.

This distance of 3 nautical miles is not, however, unalterable. It is agreed to-day that this distance is too short, as it no longer agrees with the range of the newly perfected guns, whose balls can be projected to a distance of 5 miles; it is only just, then, that this limit should be proportionately extended. This is the suggestion made by Mr. Seward, Secretary of State of the United States, to the English Legation, at Washington, in his note of October 16, 1864, in which he submitted the question of the propriety of extending the jurisdiction of the States, bordering on the sea, from 3 to 5 miles, and the enjoining of warships from firing at a distance of less than 8 miles from the shore, so that the limit might be determined by actual figures instead of being made to depend on the variable range of guns.

Until such proposals have been fixed by statute, proposals which appear to be founded on the logic of facts as well as reason, and until a decision sanctioned by the majority of States shall have been reached, the demarcation of 3 nautical miles constitutes, from an international point of view, a fixed rule to be observed and respected wherever treaties have not established another. Two or several nations are at liberty to modify the principle conventionally, to restrict it or to enlarge it; but such provisions are binding only between them in their reciprocal relations and they have no right to apply them to, and still less to impose them on other States.

In this way the Emperor of China, having granted to the British Crown the right to exercise jurisdiction over British subjects in China, this Crown, by an order in council in which the Chinese Government acquiesced, extended its jurisdiction over its subjects "who may be in the possessions of the Empire of China on any vessel at a distance of not more than 100 miles from the coast of China."

§ 357.—From the law of navigation springs the fishery law.

Sea fishing is subdivided into fishing for small fish (*petit pêche*) and fishing for large fish (*grande pêche*).

Fishing for large fish includes whale, cod, and other fish which must be caught in remote waters; it implies a certain number of ships and extensive maritime expeditions.

Fishing for small fish comprises, above all, coast fishery, which consists in the exploitation of waters near the shore and the territorial sea.

Fishing for large fish is free to all and can not be limited; it is a natural right resulting from the freedom of the sea; in the same way as the use of the high seas for purposes of navigation is common to all, so are they open for purposes of fishery to all nations and all individuals.

But international practice has given to every nation the exclusive right to fish in the waters adjacent to its shores, so long as it does not extend beyond the zone of the territorial sea.

Some Governments have contended that the extent of the waters reserved for fishing purposes, to the exclusive profit of the inhabitants along the coast, should be greater than that reserved for defense; but this contention has never been admitted in law. Denmark having at one time claimed the exclusive right to fish throughout the entire sea of Greenland, though she afterwards reduced her pretensions to waters 75 miles from the coast and held that her right was founded on possession recognized by treaties, the other States refused to respect such pretensions on the ground that as dominion over the high seas could not be acquired by custom or treaty, it was impossible to extend the limits of territorial waters.

If such derogation from principles universally recognized occur it is because they are dictated by a maritime interest of the first order, especially the exploitation of coast fisheries of an exceptional nature, such as oyster beds and those of shell fish; they must be restricted to the limit of the special object which has caused their adoption, and in order to become obligatory they must be sanctioned by special written conventions.

Each State can renounce the privilege reserved to its nationals to fish in the waters under its jurisdiction and may grant such permission to citizens of another nation; it may even declare the fishery free.

With regard to the law of fishery in territorial waters, Vattel says:

The various uses to which the sea near the coasts can be put render it a natural object of ownership. Fish, shells, pearls, amber, etc., may be obtained from it. Now, with respect to all these things, the resources of coast seas are not inexhaustible, so that the nation to which the shore belongs may claim for itself an advantage thus within its reach and may make use of it, just as it has taken possession of the lands which its people inhabit. Who can doubt that the pearl fisheries of Bahrein and Ceylon may be lawful objects of ownership? And although the supply of fish is less easily exhausted, yet, if a nation has specially profitable fisheries along its coasts of which it can take possession, are we not to allow it to appropriate that gift of nature as being connected with the territory it occupies, and to keep itself the great commercial advantages which it may enjoy, should there be fish enough to supply neighboring nations? But if, instead of taking possession of its coastal waters, it should once recognize the common right of other nations to fish therein, it may no longer exclude them, having left those fisheries in their primitive condition of common property, at least with respect to those who have been making use of them.

§ 358.—Concession to another nation of coast-fishery rights is ordinarily the subject of conventional agreements; but although certain treaties exist in which rights based on grounds independent of any convention are recognized, conventional arrangements in such matters do not confer any other right than that which is stipulated in them to express terms. Thus, in old treaties between France and England, subjects of the one Crown had the right to fish in any part of the waters separating the two countries at certain seasons of the year; from this text it is reasonable to conclude that during other seasons the subjects of two Crowns had no right in common to fish everywhere in the same waters.

The Paris convention of August 2, 1859, defines the limits within which the general right to fish in any part of the waters adjacent to the coast line of one or the other country is reserved to its nationals; it is stipulated, consequently, that they will enjoy the exclusive right to fish at a distance of 3 miles from the point of low tide, along the

entire length of the respective coasts; this 3-mile radius, fixing the limit of fishery rights, for bays measuring not more than 10 miles at their mouth, was reckoned from a line running from one cape to another. The miles referred to in this treaty are nautical miles, measuring 60 to the degree of latitude. We should add that this convention was in force in English waters only, as the French legislative chambers never sanctioned it, and this is all the more regrettable as the convention is greatly superior to that of August 2, 1839, and to the regulations of June 23, 1843.

However that may be, the part referring to the regulations, particularly the method of punishing offenses imputed to fishermen of the Manche, having given rise to serious practical difficulties, France and England, on November 11, 1867, concluded a new convention which defines the principle better and more in detail as also the direction of the limits of the fishing grounds and the exercise of jurisdictional powers; in this convention fishing in territorial waters is reserved for nationals only.

In 1868 the English Government signed with the North German Confederation, and in 1874 with the German Government, an arrangement covering regulations to be observed by English fishermen in the pursuit of their calling along the shores of the German Empire. Finally, the policing of the fishing grounds in the North Sea, outside of territorial waters, was regulated by an international convention signed at The Hague by Germany, Belgium, Denmark, France, Great Britain, and the Netherlands.

For the application of the provisions of this convention, the limits of the North Sea are fixed as follows:

I. On the north by the sixty-first degree of latitude.

II. At the east and south: 1. By the Norwegian coasts between the sixty-first degree of latitude and Lindesnaes lighthouse (Norway); 2. By a straight line drawn from Lindesnaes lighthouse to Hanstholm lighthouse (Denmark); 3. By the coasts of Denmark, Germany, the Netherlands, Belgium, and France as far as the Gris-Nez lighthouse.

III. On the west: 1. By a straight line drawn from the Gris-Nez lighthouse to the most easterly of the lights at South Foreland (England); 2. By the eastern coasts of England and Scotland; 3. By a straight line joining Duncansby Head (Scotland) to a point south of Ronaldshay (Orkney Islands); 4. By the eastern coast of the Orkney Islands; 5. By a straight line joining the light at North Ronaldshay to the light at Sumburgh Head (Shetland Islands); 6. By the eastern coast of the Shetland Islands; 7. By the meridian from the North Unst light (Shetland Islands) to the sixty-first degree of latitude.

The fishermen of each nation have the exclusive right to fish within a radius of 3 miles, from a line taken at low tide, along the

entire length of the shores of their respective countries as well as along those of the islands and banks belonging to them. Free navigation is granted to fishing vessels navigating territorial waters or anchored within them.

Italy also has concluded with several other countries treaties governing sea fisheries; some of them only reserve the right of fishery for the profit of their nationals.

In the treaties between Italy and France, Belgium, Austria-Hungary and Portugal, the contracting parties reserve to themselves the right to grant special privileges to the national flag so far as regards trade in products of the national fisheries.

It is the rule that this privilege should be accorded to aliens whenever under a treaty aliens are placed on the same footing as nationals and when no reservation is made with reference to fisheries.

It is the rule, also, in all cases where aliens are permitted freely to exercise the fishing industry that they are obliged to observe territorial laws and regulations, and are not allowed to fish in prohibited seasons.

§ 359.—Generally ships and barks used exclusively for sea fishing are not required to carry papers such as must be carried by ships sailing over a longer course. They are, therefore, usually provided only with a list of the ship's company and in time of war this suffices to exempt them from capture. Ships engaged at a great distance in fishing for large fish, must, however, be excepted, as they everywhere receive the same treatment as vessels engaged in commerce and sailing over long routes.

Finally, fishermen who are engaged in the legitimate pursuit of their calling are recognized as having the right to land for the purposes of drying or repairing their nets and of procuring necessary provisions.

§ 360.—The following is a statement of the negotiations initiated by the United States relative to fishing rights off the Atlantic and Pacific coasts. We find it in Wharton.

In the first place, with regard to the right to fish off the northeast coast of the Atlantic, the Americans contend that it is above all due to the bravery of the New England soldiery that Great Britain owes the conquest of the Canadian coast. From this fact and from the fact that the United States once formed part of the British Empire, the Americans claim their right to fish off the banks of Newfoundland. The Americans have fought in every war for the extension of this right, and they can no more be excluded from it than can the inhabitants of London or Bristol. How could they have lost this right? The separation from England took place by mutual consent, and this separation still less invalidates the right of the Americans,

as it was partly due to the attempt of Great Britain to exclude them from the fisheries that they took up arms.

This is clearly the conclusion to be derived from Article III of the treaty of peace of 1783 between England and the United States. . . .

Wharton then passes on to the consideration of the situation created by the conflict of 1812. He starts from the principle that war between two sovereign states does not invalidate the provisions of treaties theretofore concluded between those states, so far as these provisions relate to the primeval rights of nations, such as national independence, boundaries, and other attributes of sovereignty. Among such appurtenances he includes fisheries. The war of 1812 in his opinion no more vacated the rights of the United States to its common share in the northeastern fisheries than it vacated their independence, or the boundaries which separated their territories from those of Great Britain. Wharton cites in support of this statement the opinions of a number of eminent counsel in the United States, as well as the following fact:

Great Britain has always upheld the validity of the pretensions of British settlers to the use of the coast and waters of Belize for the purpose of cutting and shipping logwood and mahogany, pretensions based on a remote informal grant from Spain when sovereign of those shores and which was not vacated by the war between Great Britain and that power. This appears, among other things, in a speech made in the House of Commons by Lord Hawkesbury, then prime minister of England, a speech of which Wharton cites the principal passage.

During the negotiations which resulted in the Treaty of Ghent, there was frequently question of the fisheries on the northeast coast of the Atlantic, and the United States maintained all their contentions in this connection. But in order that the conclusion of peace should not be delayed by incidental questions, this matter was referred to a commission which sat at London in 1817 and 1818, the United States members of which were Messrs. Gallatin and Rush, and the British members Mr. Goulbourn, undersecretary of state, and Mr. Robinson, treasurer of the navy. The following is the first article of the convention which was ratified by both parties:¹ . . .

From nothing in this article can it be inferred that Great Britain conferred fishing rights on the United States. The United States only renounces certain privileges which implies on the part of Great Britain that these privileges existed and that the United States only ceded a part of their sovereign right. Great Britain did not say to

¹ *Post*, p. 646.

the United States: "Come to seek shelter only or to get water or wood," but the United States said to Great Britain:

We, the owners in common of these fisheries, consent not to take fish or to dry them or to salt them within certain limits, and also not to abuse the privileges which have been conceded to us.

The general doctrine of international law concerning the coastline is that territorial jurisdiction ceases 3 miles from shore. This doctrine is equally in force for the northeast coast of the Atlantic and was recognized by the cabinets of London and Washington in the treaties of 1783 and 1818.

§ 361.—With reference to the Bay of Fundy there arose in 1845 a discussion as to whether large 'bays' (a term generally synonymous with the French word *golfe*) can be considered as the open sea. Interpolating this expression in a speech before the Senate of Washington on August 3, 1852, Mr. Cass showed that there were a great number of bays which are open seas, like the Bay of Biscay, Baffin Bay, etc., and that the bays referred to in the above-mentioned conventions belong to another category, being classed with harbors and creeks.

These may therefore be likened not to the bay of Fundy or the Bay of Biscay, but to sinuosities of the coast where fishermen's boats are accustomed to penetrate. This is also inferred from the terms used by the negotiators as well as from the law of May 12, 1836, promulgated in Nova Scotia, a law which recognizes the convention, supervises over its execution and declare that harbors include bays, ports and creeks. Nothing could show more clearly the nature of the refuge granted to American fishermen.

The rights of these fishermen to penetrate into the Bay of Fundy has also been recognized by arbitration in the case of the schooner *Washington*, and the Government of His Britannic Majesty has confirmed this decision. . . .

§ 365.—The general custom among nations authorizes States to exercise jurisdiction over the maritime zone to a distance of three marine miles, or to a length of a gunshot from their coasts.

This was the opinion of English counsel in the case of the German vessel *Franconia*, which, at a distance of three miles from the English coast on her way to a foreign port, rammed an English ship and sank it, one passenger on board of the latter being drowned. According to the facts this was, under English jurisprudence, homicide without premeditation; it was on this charge that the case of the *Franconia* was brought before the principal criminal court of London; but the vessel was acquitted as the court was divided in its opinion. While the minority, six against seven, maintained that

the sea to a distance of three miles from the coast of England forms part of British territory; that English criminal laws are applicable up to this limit, and that the admiral had formerly, and criminal courts have to-day, jurisdiction to prosecute crime committed within this limit though committed on foreign ships, the majority, basing their opinion on the fact that prior to Act 28 Henry VIII, C. 15. the admiral was not empowered to prosecute crimes committed by strangers on board foreign ships either within or without this three mile limit from the coast of England, and on the fact that subsequent statutes confined themselves to transferring to common law courts the jurisdiction which the admiral formerly possessed, decided that in the absence of a statutory act the central criminal court had no jurisdiction.

As will be seen this decision of the majority did not invalidate the opinion of the minority on the point of issue, namely, territorial maritime jurisdiction, the extent of which it implicitly recognized; it confined itself to raising an objection in view of the absence of a law regulating the matter and which was founded especially on the personal character of the accused.

The maritime jurisdiction of a State includes also the waters which surround it, the harbors, bays, gulfs, mouths of rivers and the waters inclosed within its territory.

The questions which may arise on the subject of the extent of the right of jurisdiction being of great importance in international relations, we shall treat them here separately according to the distinctive character of each.

§ 366.—Harbors and roadsteads belong of right to the nation which inhabits the adjacent coasts. This ownership, a necessary consequence of the geographical position of States, not affecting the right of other nations to the free use of the sea, is sanctioned and recognized by international law as indisputable. The sovereign possession of harbors and roadsteads gives to the nation which enjoys it the right to declare them closed, open or free, and freely to impose, with regard to other nations, on foreign ships and merchandise such taxes or such internal regulations as it may deem appropriate to its interests. In order, however, that these measures and regulations may conform to the principles of international law, they should be general in character, that is to say, they should be applied to all nations and are not to be included among those privileges which subvert the law of equality of States. The country, which, without good reason, should close its ports to the commerce of one nation and leave them open to that of another, would fail in one of the most essential duties and would expose itself to complaints which might eventually result in retaliatory measures. In principle, a port open to commerce

is tacitly considered to be accessible to the ships of all nations, and unless contrary provisions are made in treaties, free entry granted to merchant ships is also extended to warships of friendly States; this is a point on which all political writers agree. There are, however, certain special circumstances which authorize a State to refuse admission to its roadsteads and harbors to warships of another State. Thus in 1825 a French quadron was detained for several hours at the entrance of the port of Habana, because the Spanish authorities dreaded the conflicts which might arise from the presence of such large naval forces. The explanations furnished by the admiral in command having calmed all apprehension, the squadron was permitted to anchor inside the port and remained there for several days.

The admission of war ships to certain harbors and roadsteads is not only influenced by political considerations or international conventions, which vary according to time and places, but it is sometimes subordinated to questions of public order and safety. For example, in certain commercial ports men of war are not permitted to enter until they have deposited their ammunition in a safe place, and they are not permitted to take it aboard again until they are about to leave.

To guard against any difficulty with respect to war ships, several Governments have regulated the matter by means of conventional clauses; they have stipulated especially that they will receive in their harbors only a limited number of foreign men of war, from three to six at most. It was with a view to conforming to the regulations on the subject agreed to between France and the ancient Kingdom of the Two Sicilies that the French Vice Admiral Hugon, on arriving at Naples in 1842, was obliged to separate his squadron, part of which anchored opposed to the city, and part at the extremity of the bay, and the remainder at Castellamare. It is hardly necessary to call attention to the fact that the restrictions or precautions usually adopted for forts and fortified places in the interior of a country are the result of common law and are fully justified when they are extended to aliens, civil or military, who wish to visit ports and arsenals destined for the construction, armament or repair of war ships.

§ 367.—Gulfs and bays protected either naturally by islands, sand bars, or rocks, or by the cross fire of guns placed on each side of their entrances, belong to the territorial sovereignty adjoining. As regards liberty of access and jurisdictional law they are regulated by the same principles as those which we have just established for inner harbors and roadsteads.

§ 368.—There are two sorts of straits; those which end in closed waters, that is to say, waters the sovereignty of which may be claimed exclusively by the State whose shores they wash, and those which

serve as a means of communication between free waters. The first constituting as they do, personal and private dominion, are governed by laws and regulations peculiar to each country; the second, affecting necessarily the interests of various States to which they give freedom of access, can never become the sovereign property of one only, and should remain as absolutely free to all shipping as the seas to which they lead.

This freedom of access and transit admits, however, of certain restrictions inherent to the right of preservation of the State whose shores are situated on these straits; and when the configuration of the straits obliges ships sailing through them to pass under the fire of forts placed on the one or the other bank, the sovereign who is master of the coast has the indisputable right to supervise the navigation, and to take, above all in time of war, such precautions as prudence and the care of its safety render necessary.

§ 369.—It may also happen that the navigation of a strait may be attended with such difficulty and danger that it can not be accomplished without the assistance of practical and experienced men, and without the aid of lighthouses and appropriate signals. There is no doubt that in these cases the State which, in the interest of navigation, maintains the lights or pilot stations has the right to indemnify itself for the expenses which it incurs and to impose certain financial charges on the sailors who take advantage of them.

Considered strictly not as toll but as payment for service rendered, taxes of this nature are legitimate and in conformity with the true principles of the question. But it has not always been so, as we shall show in analyzing the practice followed in several countries in the imposition of fees at the entrance and exit of great maritime thoroughfares.

§ 472, *page 570*.—We think it hardly necessary to call attention to the fact that the principles enlarged upon here concerning jurisdictional sovereignty are applicable only between Christian nations. So far as Mohammedan nations and those of the Far East are concerned, rules of conventional law are exclusively followed, and they are bound by these rules to States of the west. With regard to barbarous regions, where the beneficent effects of Christianity have not yet been felt and in which there exist only a few European establishments, such as commercial exchanges, markets for barter, etc., the exercise of jurisdictional authority has no fixed foundation and depends on circumstances hardly governed by international law. We may state, however, that on the western coast of Africa, where maritime relations are maintained and exchanges established, France (whose example England, Spain, and Portugal have followed) claims and exercises a direct and sovereign jurisdiction within the radius of her naval forces. The courts have sev-

eral times sanctioned this right. We may cite, among others, an important decree of the Court of Cassation rendered on May 17, 1839, apropos of the murder of a Frenchman at Cayor. This decree not only recognized the competency of French tribunals over certain crimes, but it proclaimed that under the terms of a royal ordinance of 1834 French councils of war are empowered to judge even the crimes and offenses committed by the natives of Senegal among themselves outside the limits of the colony.

We have already called attention to the special character of war ships and the immunities which this character confers. We shall observe here, with Mr. Dana, the commentator of Wheaton, that immunities enjoyed by men-of-war depend rather on their public than on their military character. They are granted not to the man-of-war, but to the national vessel invested as such with a certain sovereign character.

From this point of view the commander of a war vessel may be compared to a diplomatic agent accredited to a foreign court, the staff and crew under his orders, to that of the official and unofficial personnel of a mission, and finally the ship itself to the embassy or legation.

From this resemblance, which universal custom recognizes in fact, there results first the fact that all naval vessels and their crews are governed by the fiction of extraterritoriality and are entitled to all the prerogatives and immunities thereto attached.

The second inference to be drawn is that no authority other than the Government to which it belongs has a right to concern itself with what happens on board the war ship.

§ 473.—This last point is not difficult to understand nor can it give rise to any valid objection so long as the ship is at sea, for the reason given above, namely, that the high seas are not under the control of anyone.

§ 474.—But as soon as the ship arrives within the jurisdictional waters of a foreign State, such as harbors, roadsteads, coastwise and territorial waters, it is in the presence of two sovereignties, two distinct powers, and it may be a question whether, during its sojourn, it shall be under the jurisdiction of the waters in which it is anchored, or under that of its own country. The reasons which everywhere subject the merchant ship to territorial jurisdiction can not be applied to the man-of-war, which, as we have explained, has an essentially different character, organization, and use; so that wherever it may be, it is governed by the sovereignty laws of the Government to which it belongs; the State in whose waters it accidentally finds itself has with it only international relations delegated to competent authorities under conditions indispensable to the maintenance of internal rights of each State.

§ 475.—The immunity derived from extraterritoriality extends to rowboats, cutters, launches, and other accessories or appurtenances of a war vessel. But it does not extend to the merchandise nor to ships seized in violation of the neutrality of the country to which the prizes may be brought. Such is the theory underlying the decree of the Supreme Court of the United States in the case of the Spanish ship *La Santissima Trinidad*, the cargo of which had been seized on the high seas by ships commissioned by the United Provinces of the Rio de la Plata during the war of independence, but armed in United States ports.

The court recognizing that the United States was at peace with Spain and that the seizure had been made by ships armed and equipped for war in a port of the Union, decided, first, that the armament of the captor, owing to the conditions under which it was procured, constituted an attempt against the neutrality of the United States; secondly, that it followed from this that it would be an aggravation of this violation of the law of nations to permit ships of this character to commit hostile acts against other nations with the armament which they had procured in ports where they had sought asylum; and thirdly, that as no jurisdictional immunity could cover such acts, a strict obligation existed for the return of the merchandise claimed by the Spanish owners as having been unjustly seized.

§ 476.—From the principle which, under the circumstances, exempts warships from the control of the authorities as well as from the civil and criminal jurisdiction of the courts of the foreign country in which they are at anchor, there results the fact that to go on board by force is an insult to the flag and may cause grave complications and may justify the rupture of relations between two states.

§ 477.—Above the jurisdictional immunity of which we have just spoken, may be placed the rights of preservation and sovereign independence. Every Government is therefore authorized either to prohibit foreign men-of-war access to her ports, if it have serious reasons for not following, so far as they are concerned, the ordinary rules of the law of nations, or to take measures for supervision and safety, if it thinks their presence dangerous; it would not even exceed its right, should occasion arise, in ordering these ships to leave the port of the territorial waters, which, according to circumstances, may lose their defensive character and assume the offensive, this constituting a legitimate cause for war.

§ 383, page 517.—The supervision and control of the customs inside the territorial waters, or along the maritime boundary, are everywhere governed by nearly the same principles, namely, river police, visits and detention of ships or boats suspected of smuggling,

seizure of prohibited articles and punishment, such as fine or imprisonment, for violation of the customs laws of the country. England has on this subject a very precise law, that of August 28, 1833, by the terms of which any foreign merchant ship found one league from the shore, and which, weather permitting, does not continue towards its port of destination, is summoned to leave within a period of 48 hours, and in case of disobedience, becomes liable to confiscation if contraband merchandise is found aboard.

"It is not contrary to the law of nations or to that of nature," says Grotius, "that those who assume the charge of duty of ensuring and aiding navigation, either by building and maintaining light houses, or by placing buoys to mark reefs or shallow water, should impose a reasonable tax on ships which navigate those waters."

Martens and Azuni see in this a *right* belonging to maritime powers, duties so imposed on ships sailing within the limits of their maritime jurisdiction being destined to defray the expenses necessary to the safety and convenience of navigation.

Any ship which anchors within the jurisdictional waters of a state should submit to the jurisdiction of that state so far as regards all reasonable taxes imposed for the maintenance of the general safety of the navigation along its coasts. But if the ship only passes along the coasts without anchoring at the distance of a marine league from shore, or without entering a harbor or roadstead, it is not subjected to the payment of territorial dues.

§ 384, page 518.—In reality, it must be recognized that all the questions which we have discussed above are directly attached to or necessarily end in one and the same fundamental principle, that of the freedom of the seas. If we consider the waters which encompass the globe as the common patrimony of nations, and if we take into account the historic development of nations as well as the progress of civilization, we arrive naturally and by degrees at what we have characterized as external public law of modern times. If, on the contrary, we reject the absolute principle of the freedom of the seas, with the aid of reasons more specious than just, we arrive at practical conclusions which can not be admitted by reason and equity, we perpetuate the causes of war, and stir up profound and dangerous strife in the maritime relations of states. From all these points of view the importance of the question of the free navigation of the seas and the special attention which it has received from political writers may be understood.

However this may be, maritime navigation and commerce have created relations of mutual obligation and duties of a special character between nations, and from these have arisen, according to circumstances, places, and special needs, either unanimous consent, or isolated customs and usages, or regulations, or separate treaties.

CARNAZZA-AMARI: *Traité de Droit International Public en Temps de Paix.* Paris, 1880, 1882.

[Translated into French from the Italian, by Montanari-Revest.]

Volume 2, page 41.—Rights of property and sovereignty over the sea have never been recognized. Selden among the older authors and Ondes-Reggio among the more recent were wrong in seeking to prove the contrary by giving an extensive interpretation to certain expressions contained in historic monuments of ancient peoples, such as that in the Rhodian law in which the Roman people declared themselves *dominus mundi*, and consequently master of the lands and seas which compose the earth. The Romans included within this domain only the objects making part of it, and not the elements the nature of which excluded them. Likewise no value is to be attached to arguments drawn from pompous titles which nations formerly assumed, in declaring themselves *mistress* or *queen of the sea*, etc. This pretended domination rested upon their maritime predominance and upon the power of their fleets rather than upon any right to property in the ocean. To-day we admit as an established fact that ancient peoples never claimed such a right.

Nevertheless in the fifteenth century, when Vasco da Gama, seeking a new route to the Indies, navigated around the Cape of Good Hope, and Christopher Columbus discovered America, a complete change in navigation resulted which led certain States to claim a sovereignty over certain seas. In fact, in the sixteenth century and at the beginning of the seventeenth, Portugal sought to forbid the free navigation of the Guinea Sea up to the East Indies and, based on the priority of discovery and pontifical grants, claimed a right of sovereignty over these waters. The English, under Charles I, Cromwell, and Charles II, made similar claims over the seas which surrounded their territory. Without assigning precise limits, they maintained that their seas extended to the territorial waters of other States, and that the seas embraced between the coasts of Great Britain and those of the United States of America, which they called British seas, were subject to their exclusive sovereignty. The Spaniards declared themselves sovereigns of the Pacific Ocean, and the Dutch, forgetting that they had formerly been defenders of the liberty of the seas, also claimed their sovereignty and attempted to prevent Spanish vessels from proceeding to the Philippine Islands via the Cape of Good Hope. The Genoese claimed sovereignty over the Ligurian Sea, and the Venetians over the Adriatic, basing themselves upon the ceremony of Bucentaure, during which every year the Doge advancing into the sea threw out a ring and married the sea while pronouncing a certain Latin formula.

The writers who maintained a right of sovereignty over the great seas were Gentilis, Pacius (Julius), Gotofredus, Paolo Sarpi, Burgus, Rivius, Marisoltus, Schookius, Coringius, Jenkinson (Lord Liverpool), Selden, de Frétab, Heineccius, Borough; the defenders of the liberty of the seas were Grotius, Pufendorf, Graswinkell, Hubérus, Graverus, Groeningius, Pontanus, Bynkershoek, Lucchesi-Palli, Hübner, Azuni, Galliani, Hautefeuille, Klüber, Martens, Wheaton, and all recent writers on international law. We may say therefore that the question to-day is settled in favor of the liberty of the great seas. States have in fact long ago abandoned all claims of this kind and have recognized the principle admitted by science and common utility. . . .

Page 52.—We must likewise reject the opinion of Montesquieu, Vattel, Klüber, and other publicists who believe that States have the faculty of renouncing by a treaty the use of the sea. The use of the sea is necessary to the development and at least moral existence of States, and for that reason alone it is inalienable. It would be in vain to argue that prolonged non-use would lead to a loss of the right which a State possesses over the sea, for as an abstraction from the reasons given it suffices to remark that navigation and fishing constitute optional rights of peoples which they may exercise at their pleasure, and which are consequently imprescriptible.

Azuni makes a hypothesis which strikes us with little favor. He admits the validity of the renunciation by a State to the use of the sea in cases in which all nations consent to it. However, all the people united have not the power of transforming right into injustice, of placing in commerce things which are not commercial, and much less of subjecting to the sovereignty of a State or to conventions an element which nature has liberated from bonds of all kinds. Finally, we may observe that whatever the sense in which it is admitted, the renunciation of the use of the sea would, in last analysis, lead to a denial of the principle of the liberty of the seas. In fact, States could one after the other renounce this use, and consequently permit its domination to pass into the hands of some or even one of them. This rule would involve a free grant of sovereignty over all the ocean which is neither physically nor legally possible, and a convention to this effect would be void.

§ 11, *page 53.*—The principle of liberty, while incontestible in the case of the open sea, is not applicable to seas which without being indispensable to the free communication of States are nevertheless necessary to the peoples inhabiting the shores from the point of view of defense and fishing. This is the case with (1) adjacent seas over the distance which may be covered by a projectile launched from shore, (2) straits, (3) interior closed seas, (4) ports and roadsteads.

These parts of the sea are far from being useless to States. On the contrary, their exclusive possession is necessary to riparian peoples, notably to guarantee the security of their territory which may be compromised by the approach of enemy's vessels and assure the complete control over customs collections which would be considerably reduced if all ships were freely permitted to frequent these places.

Let us add that these seas are not inexhaustible, for fishing can not be exercised there promiscuously and without limit, as in the open sea. This is so true that each State has its municipal regulations to determine the time and form in which fishing is to be carried on. Foreign navigation, above all, of war vessels may at times compromise the security of the neighboring State. It is not, therefore, innocent as in the open sea.

The possession of the territorial sea is possible because by erecting fortifications upon the shore the State can prevent access and guarantee the exercise of sovereignty. Consequently the adjacent seas, ports, gulfs, straits, bays, etc., are subject to the sovereignty of States and considered a part of their territory. But in what sense are they subjected to the national sovereignty and assimilated to the continental territory?

The Roman law had special laws upon this question. Besides, the majority of jurists, adopting the principles which we have just explained, believe the principles which govern continental territory may be applied to these seas. However, as this application is not always exactly possible, they are obliged to have recourse to certain legal fictions in order to explain by the aid of these hypotheses, the relative rights and duties of States in these waters. In our opinion it is sufficient to go to the real sources of the right and to examine these elementary principles in order to arrive at a uniform and conclusive solution of the questions which may arise upon this matter.

The Romans considered the sea, the running water, and the coast as the property of all men. Consequently no one was forbidden to descend upon the coast and establish himself there. They considered the coast as the land which the highest tides of winter covered. Every person could fish there.¹

The coast was not a part of the territory of the Roman Empire, but marked its exterior limit. It is true that the Roman people had the right to watch over the coast and oppose invasion of it in order to defend their territory. The shore of the sea being a common thing could not become the property of anyone; but following the rule established for common things, every individual had the power to assume control over and take it for his use. Thus, a building could

¹ Digest 1, 9, (*De divistone rerum*), 4 (frag. Marc.).

be raised if nobody objected. Nevertheless it was necessary to obtain the permission of the praetor, who only refused in case public use of the shore or private utility was opposed to its grant. However, if anyone raised a building without this permission everyone had the right to demand its demolition, which was only rarely ordered unless the building injured the public use. . . . Thus, according to the Roman law, the sea and consequently the water which composes it could not be the property of anyone. It was likewise with the shore over which, however, the Roman people exercised a jurisdiction as much to regulate its use as to defend themselves against foreign invasion.

Ports, on the contrary, belonged to the Roman people; but their use was common, and had been regulated by special laws. The praetor in this matter also had numerous interdicts.

Actual laws, from the Code Napoleon to the Italian Code, class among the property of the public domain the ports, shores, and beaches of the sea which embrace all the ground covered and uncovered by the sea during the new and full moons as far as the highest tides of March extend. The Reporter of the Code of Merchant Marine of the Kingdom of Italy said: "It is a positive principle of the law of nations that the shore of the sea, the gulfs, beaches, and canals, are all property of the nation, but their use is public for the convenience of citizens and foreigners." The code establishes the provisions covering the regulation of their use.

Nevertheless this property of the public domain being of common use is under a simple right of territorial sovereignty which authorizes the State to subject it to its jurisdiction so far as its interests require and its power permits. The sea is not susceptible of an entire and complete sovereignty like the land. States can therefore only exercise over it a limited sovereignty, as we shall explain later in treating of certain seas.

§ 12, page 59.—As we have shown in the preceding paragraph, positive law restricts the right of property of a State in ports, shores, canals, and on the shore of the sea. As to the adjacent seas, no right of property is recognized.

In fact, the water which washes the coasts of a country is not susceptible of possession. . . . We have said that a man can only acquire property by his work, by the aid of which he impresses on things the marks of his activity, which manifests his intent to appropriate and gives rise to the bond of ownership. Now, the sea by its nature refuses all modification by human hands. It is not, therefore, susceptible to ownership. Hence, it can not be the object of sovereignty, which is founded on the same principles as the right of property. However, States are obliged, in the interest of their defense and subsistence, to subject to their use the seas which wash

their coasts, which they may, in case of need, maintain under their dominion by force of arms. A limited sovereignty is therefore granted over these waters, or rather a right of surveillance and jurisdiction very different from that which they exercise over continents. In this sense it is that seas are called territorial. "States," says Calvo, "have not the right of property over the territorial sea, but only a right of surveillance and jurisdiction, whose object is to secure their defense or to protect their fiscal interests. Consequently the nature of things extends this right as far as its existence is justified, but stops it where fear of serious danger, practical utility, and the possibility of effective defense cease."

§ 12.—Thus, we may admit the property of the State over the coast of the sea, over its beaches, and even over the fruits of the submarine soil, but it is not possible to extend it over the volume of water which washes its coasts. Nevertheless, States are within their rights in requiring that their security be not compromised by the easy access of foreign vessels coming to threaten their territory. They ought to watch over the collection of imposts necessary to their existence with which national and foreign products are burdened, and whose collection contraband commerce would render null if it could not be checked. Thus, they may fear that their tranquillity may be troubled by acts of hostility carried on along their coasts by ships of belligerent States. From all these points of view we must grant to each nation a right of surveillance over the sea, to watch its coasts in the limits which are required for its security and tranquillity and the protection of its treasury. This surveillance is, moreover, of such a nature as to be exercised from the shore by the aid of means of defense obstructing the approach of foreign vessels. It is in this sense merely that these seas are called territorial seas and in this measure that we may apply to them the laws which exist on the continental territory.

(The author then traces the history of the extent of the territorial sea, citing Baldus and the extraordinary theories of Valin and Rayneval, and comes to the conclusion that Bynkershoek's theory is the correct one. He says that only Vito d'Ondes-Reggio has combated these facts, and maintains that his point of view declares force the basis of the right of maritime territorial sovereignty, and causes a revival of the theory of Hobbes, formerly contradicted, for whom the right has no other basis than the needs of man. Hence the territorial sea extends as far as his needs require.)

Page 64.—If we admit force as the limit and basis of sovereignty of States we can not deny the justice of the criticism of the Sicilian publicist. Undoubtedly we ought to recognize that the needs of man are the limit and basis of all rights, but among these needs is the security of States; and to guarantee it we must grant it a surveillance of all

parts of the sea in which foreign vessels may enter, and consequently of all the space not beyond the range of cannon. Hence that measure ought to be considered as legitimate, not because it is based upon force, but because it is the limit necessary to the security of the State. In this sense we also admit the range of cannon as the limit of territorial sovereignty of diverse States.

It is agreed that this measure ought to be taken from a point at which navigation is possible, because the defense and security of the State requires that each of them control a certain space of navigable sea. In order to stifle all contests which the irregularity of the shore might give rise to, we measure the range of cannon fire as if they were discharged from the headlands which project into the sea. We thus obtain a curved or straight line without any sinuosities mapped out from one promontory to another. The territorial sea extends from this line as far as the range of cannon.

The State possesses in the interest of its security a right of surveillance and jurisdiction over territorial waters. It follows that it may take all measures which its defense and its needs require. Thus, it has the right of demanding explanation of all vessels passing through the seas which belong to it in order to establish the intention with which they approach; to prevent acts of hostility between foreign vessels, which might interfere with its tranquillity; to establish customs ordinances, and visit ships suspected of contraband; to regulate maritime ceremonials; to pass laws relative to fishing and maritime contrivances, to prohibit these last or restrict them when they become a harmful agency; to exercise civil and penal jurisdiction over all acts of nationals and over all aliens which may exercise any influence upon its territory—in a word, take all the measures which its safety and its needs require.

§ 13, page 66.—Straits—that is, portions of the sea between two pieces of land—are subjected to the principles which govern the territorial sea over so much as is commanded by cannons. Thus, when two projectiles launched from opposite shores each cover half of the strait and meet in the center, this strait is placed under the sovereignty of the adjacent State as a territorial sea. On the other hand, if the projectiles do not meet, the space beyond the range of cannon from the respective sides is free. Such is the case with the English Channel, the Straits of Gibraltar, Mozambique, Bering, Malacca, Davis, and Bass Straits. . . .

§ 15, page 74.—Ports and roadsteads, susceptible of complete possession are of great utility for the navigation of peoples. Within a definite extent they may serve as a refuge for a certain number of vessels. Fishing is limited there and their usefulness is consequently exhaustible. They are necessary to the defense of States and the latter

have the right to forbid access to them to vessels which threaten their security. This interdiction is easy, for roadsteads and ports defended from all points of the coast may even be artificially closed. Human industry often marks them with its imprint. Man, in fact, transforms them and fashions them in all ways. At times even, ports are only artificial works constructed on beaches in which a considerable commercial movement centers, and which do not offer a real shelter for navigation. It therefore follows that the right of territorial sovereignty is better justified in the case of roadsteads and ports than it is in the territorial sea, because the means of possession and action are more efficacious and more effective over the former than over the latter. Thus, all municipal laws of States declare roadsteads and ports as national property.

However, this right of property always attaches to the land around the port or roadstead and even to the soil which supports them, but the water itself, like the territorial sea, is not susceptible of permanent ownership. It is subject to a transitory sovereignty limited to the mass actually inclosed at one time. If it flows out and becomes confused with the open sea, it escapes the sovereignty to which it is subjected while in port. This is the result of the character of this element (water), to the possession of which one can not lay claim except to the extent that one has rights over its container and over which, in the absence of the latter, all right of property and sovereignty ceases. The mariner who in the open sea dips out a glass of water appropriates it, but if he throws it back in the sea all sovereignty disappears, because nothing distinguishes the water of which he has been possessed from that common to all men, and because this element is physically impossible of actual possession.

From the point of view of commerce and navigation the use of ports is inexhaustible. In fact, vessels which throw out anchor in a port, whatever their number, provided they find sufficient room, occasion no damage. Communicating with the open seas, ports in a measure partake of the same liberty. They are the naval stations of the people. There the mariner ends his voyage and exchanges the natural, industrial, and manufactured products. Thus it is with reason, that some publicists in the name of the liberty of the seas extend to ports the liberty of free navigation as a concession from the sovereign State. For ourselves, we take the point of view that it is a right belonging to all peoples and not a concession. Undoubtedly a State which possesses a seaport has over its waters a right of police and sovereignty in the interests of its defense, but it can not, without plausible reason, refuse to open it to innocent navigation. We even think that if it kept it closed without reasonable motive it could be compelled to open it, as China was made to do with the port of Canton.

CAUCHY: *Le Droit Maritime International*. Paris, 1862.

Volume 1, page 37.—For the present it suffices to have shown by two convincing arguments that the very nature of the sea resists the domain of man and that, being inexhaustible in its use, it lacks the one characteristic which legally could justify an individual and exclusive possession.

Whence we believe that we may conclude that a state of liberty, of free navigation, of common and indivisible enjoyment is the normal, natural, and actual status of the sea just as private possession, cultivation, or division constitutes the natural, normal, and actual state of the land.

But this first principle of maritime law, so evident and absolute when we consider navigation and fishing in the open sea far from any shore, is transformed and modified when the sea approaches the land and becomes almost confused with it.

The two reasons upon which the entire liberty of the open sea is founded no longer apply with the same force to either bays or gulfs by which the sea penetrates into the land, or even to the waters which wash the headlands or islands of those which merely extend along the coasts.

If it is true that the mass of waters of which the open sea is composed, by its nature escapes occupation or domination, we must recognize that these same waters divided into stretches of small extent become susceptible of public, or even private property. Let us in thought jump the gap which separates the sea from a mere pond. This pond, as well as the source that feeds it, is considered by the civil law as an integral part of the land which surrounds it. Let this pond enlarge itself into a lake, let this source increase into a river; neither the one nor the other will entirely change its nature. Only public law will perhaps dominate and at times replace private law when the shores of a lake or those of a navigable river belong in their entirety to the same State, and if they belong to the territory of several nations, international law will commence to govern them, but without disputing to riparian States the exclusive right of useful domination over those waters and the police of their navigation and fishing. Let us go further and descend to the mouth of this river, where, let us suppose, this lake becomes a bay or gulf, communicating by an opening, more or less wide, with the ocean, it at once falls under the empire of maritime law. It becomes sea in its turn, but it is one of those seas which publicists call interior or territorial seas. to show that they still retain more the nature of the territory than of the open sea, and, in fact, the sovereign of the adjacent land of this gulf may use it as a roadstead for his vessels. He may establish a port in this bay. He may finally supply with fortresses the head-

lands which defend its access and make himself absolute master of these waters so intimately connected with his domain. Finally does not this mixed nature of the neighboring seas off the shore again appear even beyond the gulf or bay at a place where the ocean simply washes the beach or the cliff which serves the State as a frontier? Does the domain of the sovereign over these waters depend solely upon the solution of the question whether the coast stretches out in a straight line or falls into curves of greater or smaller radius? Will the coast remain in the one as in the other hypothesis the actual frontier of such a kingdom or empire, and would the right of sovereignty and the right of defense be complete if the local prince had no police power to exercise over vessels which approach his land and over passengers and merchandise which might be discharged on his territory? Has he not, moreover, all the means of securing recognition near the shore for his legitimate domain by his flag, by his coast guards, by his forts, and by those different night and day signals which he will have established in order to watch over the security of travelers?

Let us now see whether the other reason which we have just invoked for the support of our principle does not also lose some of its force when it is applied to the portions of the sea which wash the coasts of a State.

We stated that one of the principal uses of the sea was for fishing. Now, if fishing could justly be considered as inexhaustible in this ocean, whose wealth or depth we do not know, is the same true of those portions adjoining the coast of those gulfs and bays which are plowed daily by numerous fishing vessels, all parts of which have been explored by the sounding lead, where not only the abundance or rarity of the fish but its quality, taste, and size are known in advance, and thus become the more or less exhaustible of an industry especially adapted to the inhabitants of those shores? Are there not, moreover, certain kinds of submarine products which are found only in a small number of places, and which, therefore, constitute a legitimate accessory of the territorial soil of the adjacent State? Who can maintain, for example, that coral and pearl fishing is not one of the natural resources which Providence has distributed among different peoples, spreading it at the surface of the ground or water for some and obliging others to seek it at the expense of money and dangers within the bowels of the earth or at the depth of abysses?

It can not be doubted by anybody that the portions of the sea adjoining the coasts in a certain measure participate of the nature of the coasts themselves and may, in certain respects, fall within the useful domain of such State or people or in other respects depend upon its police.

But how far shall we extend this influence of the land, this sort of reciprocal action of the two elements on each other? This is a question which, by its generality, belongs to natural law, but it clearly falls within the domain of positive law in its special solutions.

Thus, the maritime zone over which the bordering States may compel obedience varies according to the nature and object of these rights. If we contemplate the exploitation of some special product of the sea, it seems proper to examine the limitations by which this exploitation is restricted by nature itself. If, on the other hand, we contemplate a general district of coastal fishing we must ascertain at what point opposing rights are encountered—how far, for example, the passing of a school of fish near the shore may restrict the right which other neighboring peoples, or even distant peoples, have of sharing in this liberality of Providence?

Under another aspect, if we regard the special conditions of public order which the sovereign of a port may impose upon ships which frequent it, and the fiscal dues whose payment he may exact as indemnity for expenses incurred for the benefit of general navigation, we shall be led to restrict the zone of this useful domain. We shall extend it further if we contemplate the general right of defense, which for the security of each State, ought to protect the approaches to its maritime frontiers. The natural configuration of the shore, the difference between an open beach and a coast bristling with rocks and reefs may also be taken into consideration in other systems; but if each is to have its relative justice, natural law rejects absolutely every theory which could base the right upon force, and which, for example, would assign to the zone of maritime possession an extent proportional to the number of war vessels which a State could establish to protect far seawards its domain or its rights. It is evident that in thus regarding force as the measure of right we should soon arrive at a complete annihilation of the liberty of the seas. Of what utility would it be for this principle to remain written in the code of the law of nations like a dead letter or illusory protest, if by means of the progressive encroachment over the more frequented and safe seas, the natural order of things were to find itself inverted and the great channels of communication between places were to be narrowed and barred in their most important passages?

Such are the principles from which justice and conscience do not allow us to depart; but at the same time we must recognize that natural law offers no means for establishing a precise limit which can apply in all cases. Hence this divergence of opinion which is manifest among authors on a subject into which each one naturally carries his national or personal tendencies in favor of a servitude or in favor of the liberty of the seas. The wiser writers have ex-

pressed the wish that the nations agree in establishing a general rule which would, after all, be only a temporary solution susceptible of variation and revision. To speak only of the system which seems to marshal in its favor the greatest number of opinions among modern publicists, we find this to be the range of a cannon shot from the shore. If it is at the range of cannon that the zone of defense or the width of the territorial sea is to be delimited, will not the improvements made daily in this formidable art of artillery modify in the future the limit of the imaginary line which is thus drawn upon the seas?

CREASY: First Platform of International Law. London, 1876.

Page 232.—240. Such is the law of Nations as to the Ocean, the *mare vastum*, the open sea. But those portions of the sea, which are land-locked, and almost inclosed within the territories of a State, which are *intra fauces terræ*, as the phrase is, are clearly within the exclusive territorial jurisdiction of the State whose lands gird them round. In the case also of bays, or portions of sea not so completely enclosed, but which lie within a clear and well-defined concave curve, the base of which is a line drawn from one promontory, or other excrescence of the land, to another, the State, whose territories thus clasp these oceanic waters, claims and exercises exclusive jurisdiction over them. Such bays are called by British writers "The King's Chambers." According to some writers there is a limitation of distance as to the width of the bays over which such exclusive jurisdiction may be claimed. It ought not in their judgment to be allowed if the distance from horn to horn of the bay is more than twice the range of cannon-shot. But the present tendency of writers on the subject is to extend the privilege to much ampler bays. Chancellor Kent tells us that the United States "have a right to claim for fiscal and defensive regulations a liberal extension of maritime jurisdiction; and it would not be unreasonable, as I apprehend, to assume for domestic purposes connected with our safety and our welfare, the control of the waters on our coasts, though included within lines stretching from quite distant headlands, as, for instance, from Cape Ann to Cape Cod, and from Nantucket to Montauch Point, and from that point to the Capes of the Delaware, and from the South Cape of Florida to the Mississippi."

241. In the case of every nation whose territory abuts on the sea, such nation has a right to preclude Belligerent Powers from carrying on hostilities upon the open sea within a certain distance of its coast. That distance is judged of with reference to the range of artillery.

In other words, a nation's right to compel others to keep the peace in the open sea near its coasts extends over so much of the sea as the nation could command by artillery placed on its coast. This extent has hitherto been fixed by general consent at a maritime league, or 3 miles seaward; but from the great improvements which have recently been made in the range of cannons, it is probable that a line of 5 miles will hereafter be adopted as the measure. But the right of the State to exclusive jurisdiction over the adjacent sea within the range of cannon-shot applies only to purposes of defense, to the protection of the State's fisheries, revenues, and to secure its maintenance of neutrality. It does not make the sea within the specified limit a part of the State's property, although the vague expressions of some Publicists might seem to imply as much. There are several judgments of the English tribunals which are express on the subject. One is in the case of the *King v. 49 Casks of Brandy*, reported in 3 Haggard, p. 259. Sir John Nicholl, the Judge of the Admiralty Court, in giving judgment on that case, used these words: "As between nation and nation, the territorial right may, by a sort of tacit understanding, be extended to 3 miles; but that rests upon different principles—namely, that their own subjects shall not be disturbed in their fishing, and particularly in their coasting trade and communications between place and place during war; and they would be exposed to danger if hostilities were allowed to be carried on between belligerents nearer to the shore than 3 miles; but no person ever heard of a land jurisdiction of the body of a county, which extended to 3 miles from the coast." This is corroborated by the judgment of the Lord Chancellor pronounced in *Gann v. the Company of Free Fishers of Whitstable*, decided in the House of Lords in 1865. This matter also received adjudication in the case of the *Saxonia*, reported in Lushington's *Admiralty Reports*, vol. i, p. 140. In that case a foreign ship, that was navigating part of the sea between the Isle of Wight and Hampshire, less than 3 miles from the shore, was treated both by the Judge of the Admiralty Court and by the Lords of the Privy Council in Appeal as being on the high seas. In an earlier case, the *Twee Gebroeders*, 3 Robinson, 352, Lord Stowell, in speaking of a part of the waters of the Western Eems, which part was assumed, for the purpose of argument, to be within 3 miles of the coast of East Friesland, said of it: "Such waters are considered as the common thoroughfare of nations, though they may be so far territorial that any actual exercise of hostility is prohibited therein."

242. Sometimes, from the nature of the shore, it is not easy to fix the point whence the measurement of the fixed distance seaward shall be drawn. In such cases, Courts of International Law will be disposed to calculate the distance liberally. This involves a liberal construction as to the extent of territory strictly speaking. Thus,

in the case of *The Anne La Porte*, 5 Robinson, 373, it appeared that "there were a number of little mud islands composed of earth and trees drifted down by the River Mississippi, and which formed a kind of portico to the mainland. The capture in question took place within three miles of these islands, but beyond that distance from the mainland. It was contended that such islands were not to be considered as any part of the territory of America—that they were a sort of 'No Man's Land,' not of consistency enough to support the purposes of life, uninhabited, and resorted to only for shooting and taking birds' nests. It was also argued that the line of territory was to be taken only from Balize, a fort raised on made land by the former Spanish possessors." Lord Stowell, however, held that the protection of territory was to be reckoned from these islands. "They are," he observed, "the natural appendages of the coast on which they border, and from which indeed they are formed. Their elements are derived immediately from the territory, and on the principle of alluvium and increment, on which so much is to be found in books of law. *Quod vis fluminis de tuo praedio detraxerit et vicino praedio attulerit, palam tuum remanet*" (Inst. lib. ii. tit. 1. sec. 21), even if it had been carried over to an adjoining territory. Consider what the consequence would be if lands of this description were not considered as appendant to the mainland, and as comprised within the bounds of territory. If they do not belong to the United States of America, any other power might occupy them; they might be embanked and fortified. What a thorn would this be in the side of America! It is physically possible, at least, that they might be so occupied by European nations; and then the command of the river would be no longer in America, but in such settlements. The possibility of such a consequence is enough to expose the fallacy of any arguments that are addressed to show that these islands are not to be considered as part of the territory of America. Whether they are composed of earth or solid rock will not vary the right of dominion; for the right of dominion does not depend upon the texture of the soil."

243. The waters within this 3-mile limit from the coast are called by Dr. Twiss a State's Jurisdictional waters; and the term is convenient as distinguishing them from the parts of the sea that are within its ports, havens, and land-locked gulfs, which may be quite correctly called its territorial waters.

But there are some important matters, such as the right to fish, and the right to take submarine productions, which require special notice. A material difference is practically acknowledged to exist between the general right to fish and take other marine products in the open sea, and the right to do so in Jurisdictional waters. Of course, in Territorial waters (as recently explained) the right be-

longs exclusively to the State that owns the territory. But the Practice of nations has sanctioned the exclusive right of every nation to the fisheries in the waters adjacent to its coasts within the limits of its Maritime Jurisdiction; and accordingly we find that a permission for the subjects of one nation to fish within the Jurisdictional waters of another nation is a frequent subject of treaty engagement. "The various uses of the sea," writes Vattel, "near the coasts render it very susceptible of property. It furnishes fish, pearls, shells, amber, etc. Now, in all these respects its use is not inexhaustible; wherefore the nation to which the coasts belong may appropriate to itself an advantage which Nature has so placed within its reach as to enable it conveniently to make itself master of it, and to turn it to profit, in the same manner as it has been able to occupy the dominion of the land which it inhabits. Who can doubt that the pearl-fisheries of Bahrem and Ceylon may lawfully become property? And though, where the catching of swimming fish is the object, the fishery appears less liable to be exhausted; yet if a nation has on its coast a particular fishery of a profitable nature, and of which it may render itself master, shall it not be permitted to appropriate to itself that natural benefit as an appendage to the country which it possesses, and to reserve to itself the great advantages which it may derive by commerce, in case there be a sufficient abundance of fish to enable it to furnish the neighboring nations with a supply? But if, so far from making itself master of a fishery, a nation has once acknowledged the common right of other nations to come and fish there, it can no longer exclude them from it: it has left that fishery to its primitive state of communion, at least with respect to those who have been accustomed to take advantage of it." . . .

245. States may exercise a qualified jurisdiction over the seas near their coasts for more than the three (or five) limit for fiscal and defensive purposes; that is, for the purpose of enforcement of their revenue laws, and in order to prevent foreign armed vessels from "hovering on their coasts" in a menacing and annoying manner. Both Great Britain and the United States have prohibited the transshipment within four leagues of their coasts of foreign goods without payment of duties. The American Supreme Court has declared this regulation to be founded on International law.

246. There are also certain "narrow seas" over which particular States claim jurisdiction, through portions of such seas (and the greater portions) may be more than 3 miles from the coasts of those nations, and though the opposite shore may belong to another nation. It is not often in such cases that a particular nation now insists on its right to the entire property in such narrow sea, though the language of some writers on the subject goes to this extent. But

still the jurisdictional claims put forward are sometimes very ample. A claim of this kind is commonly called a claim of *Mare Clausum*; and the discussions as to *Mare Clausum* or *Mare Liberum* are memorable in the history of Jurisprudence. According to Martens, who wrote about a century ago, the following seas are acknowledged as free: "the Spanish Sea, the Aquitain Sea, the North Sea, the White Sea, the Mediterranean Sea, and the Straits of Gibraltar. The three Straits between Denmark and Sweden are under the dominion, and are looked on as the property of the King of Denmark; St. George's Channel, between Scotland and Ireland, is under the dominion of Great Britain; the Straits of Sicily are under the dominion of the King of Sicily; the Gulf of Bothnia is under the dominion of the King of Sweden; the Black Sea, the Ægean Sea, the Bosphorus of Thrace, the Propontis, and the Hellespont are all under the dominion of the Turkish Empire." The state of things is much the same at present, except probably with regard to the Ægean Sea, and except with regard to the Black Sea, which, by reason of its magnitude, seems to be incorrectly classed with the other seas which have been mentioned. The exclusive claims of the Sultan to rights over this sea appear to have depended on the fact that it is, or was, only accessible through straits of which the Sultan owned both coasts, and on the fact that for a long period the whole of the territories round the Euxine were Ottoman territories. This has ceased to be the case since the extensive conquests effected by the Russians to the north and west of its waters. The navigation of the Black Sea is now regulated by treaty.

DE CUSSY: *Phases et Causes Célèbres du Droit Maritime des Nations.*
Leipzig, 1856.

Volume 1, § 40, page 91.—Territorial Sea. We said that the use of the sea in principle and as a natural and specific right belongs to all nations. This use is general and absolute over all parts of the sea to which we may apply the name *open sea*, that is the ocean, which separates the different mainlands of the globe, and which comprises four great seas.

But the protection of the territory of a nation and its shore fishing, which is the chief resource of the inhabitants of the coast region shows the necessity of recognizing a *maritime territory*, or, better still, a *territorial sea*, for all coast States—that is, some definite distance from the coast *considered as a continuation of the territory*, and over which the special sovereignty of each maritime nation might extend.

Upon this maritime territory of the State there necessarily depend maritime regions not exclusively possessed over which the State has acquired, by express or tacit convention of all other States, a special right, over which, therefore, it continues to exercise its sovereignty.

But States have claimed to establish, each in its own personal interests, special and various limits, whose exaggerated extent must unquestionably become the occasion, in many instances, of contradiction and contests on the part of other States. A great number of distinguished publicists, in spite of their incontestable merit, have not adduced greater wisdom on this point than the States themselves.

Many governments and publicists have carried this limit of the *territorial sea* to 40, 60, and even 100 marine miles from shore. Denmark claimed sovereignty and property over the sea up to 4 miles around Iceland and 15 miles around Greenland.

Several treaties formerly fixed the limits of sovereignty over the sea which washes the coast of a State at *15 leagues*, others fixed it at 4 leagues.

France included in its treaties of 1685 and 1767 with Morocco a clause that cruisers of this latter State could not make prizes within 6 leagues of France and that no Moroccan ship could cruise within *30 miles* of the French shore. Finally, the French law of March 24, 1794, concerning customs, provides "that ships below 100 tons, navigating or at anchor within *4 leagues* of the coast of France, except in the case of *force majeure*, may be visited by customs inspectors," and the decree of 27 Thermidor, year 8 (August 15 [July 16], 1800), fixed the distance of *2 marine leagues* as constituting the limit within which no prize could be declared good.

As to the publicists, some, like Baldus and Bodin and Targa, speak of 60 miles from the shore, others of 100 miles. Loccenius, a Swedish publicist, who died in 1677, extended the property into the sea to a distance of two days' journey.

Grotius, among the publicists previous to the eighteenth century, is the only one who arrives at the truth by saying that the limit of sovereignty of the territorial sea is that which may be defended from the shore.

Valin, the learned and able commentator of the ordinance of August, 1681, limits the extent of the jurisdiction over the sea to the *range of cannon*. He agrees with Grotius.

Since then Azuni, Klüber, and others have adopted the same limit. It is likewise established in various regulations in a great number of treaties.

Edict of the *Republic of Genoa* of July 1, 1779: Article 1: No act of hostility shall be committed between the belligerent Powers in the ports, gulfs, and on the coasts of our dominion at a distance within gunshot.

Edict of the *Republic of Venice*, dated September 9, 1779: No act of hostility shall be committed in the ports, roads, and on the coasts of our dominion, and in any of the adjacent seas, *except beyond cannon range*.

Russian ruling of December 31, 1787, on privateering, Article 2: Russian privateers shall pursue hostile vessels of war and of commerce, attack, capture, or destroy them, wherever opportunity shall present itself, except in case the hostile vessel, in seeking shelter, approaches for a time *within gunshot of a port or of the coasts of a neutral Power*. They shall not undertake any act of hostility in the ports and roads belonging to neutral Powers before the enemy has passed *out of gunshot*.

The act of the fourth year of the reign of George III, king of Great Britain (1764), and the law of August 28, 1833, the fourth year of the reign of William IV, extended sovereignty to the *waters of the British Isles* and to the distance *of one league from the coasts washed by the open sea*.

The States General of the United Provinces of the Netherlands professed so great a respect for the principle of the sovereignty of the State *on the territorial sea* that the Order of 1671 concerning the salute to be given on the coasts of foreign sovereigns "*without having to pay attention as to whether it is answered or not*" states "that each sovereign enjoys *full sovereignty* within the extent of his dominion, and that within this same extent *every stranger is his subject*."

It will be well to indicate in a summary way the articles of the principal treaties which have been concluded between the various Powers relative to the limit of sovereignty on territorial waters.

1774, Article 8. France and Spain. Customhouse officials shall be authorized to search small vessels of 100 tons or less which they meet within *two leagues* from shore in the offing.

1786, Article 41. France and Great Britain. It will not be permitted that ships or goods of subjects of any power be captured on the coasts *within gunshot*, or in the ports and rivers under the jurisdiction of the two States, by vessels of war or privateers provided with licenses of any State whatsoever.

1787, Article 28. France and Russia. The vessels of that one of the contracting parties which may be engaged in war shall only attack the vessels of their enemy *out of gunshot* of the coasts of their ally; the strictest neutrality shall be observed in the ports, harbors, gulfs, and other waters included in the term *closed waters* belonging to them respectively.

1787, Article 19. The Two Sicilies and Russia. In case of war, that one of the two parties which may be a belligerent shall only attack a hostile vessel on the coasts of the neutral party *out of gunshot*.

1794, Article 25. United States and Great Britain. Neither of the two parties shall permit that the vessels or effects be-

longing to subjects or citizens of the other be captured within gunshot from the coast or in any bay, river, or port of their territory by vessels of war or others having letters of marque of a prince, of republics, or of States, etc.

1795. The treaty concluded between France and the Regency of Tunis in 1795 fixed the distance to which *absolute* sovereignty over territorial waters extends *at the range of a cannon placed on the shore*.

1801. Article 25. Russia and Sweden. If one of the contracting parties engages in war, its vessels shall only attack the vessels of the enemy *out of gunshot of the coasts of its ally who has remained neutral*.

1806, Article 12. United States and Great Britain. That one of the two contracting States which may become a belligerent shall only pursue the vessels of the enemy to a distance of *5 marine miles* from the coasts of the other, which has remained neutral, and if a nation is involved which does not recognize that limit of maritime jurisdiction of the contracting State which has remained neutral, the limit shall be *3 miles*. The contracting parties (art. 19) shall not permit that the ships of the said contracting parties be captured within the limit of a gunshot or even within the limit of article 12.

In 1839 the treaty concluded between France and Great Britain fixed the fishing limit at *3 geographical miles* of 60 to the degree of latitude *from the shore line at low tide* (arts. 9 and 10).

Article 16 of the treaty of the year 1740 between the Two Sicilies and the Ottoman Porte states that in all places in the dominion of the two contracting parties from where their respective ships can be recognized it shall not be permitted by either party that the vessels be pursued or molested.

Finally, the treaty of July 3, 1842, for *the abolition of the slave trade*, concluded at Lisbon between Great Britain and Portugal, states (art. 3): It shall not be permitted to search or detain under any pretext or motive whatsoever any ship moored in any port or anchorage belonging to one of the two high contracting parties, or *within cannon range from the land*.

“It is greatly to be desired,” said Rayneval, “for the public tranquillity, that there exist a general rule, or at least a special well determined rule on a matter so important and so exposed to uncertainty, misunderstanding and conflict.”

But it is more to be desired that the powers after having recognized the limit of sovereignty and jurisdiction over the *territorial sea*, either by treaty or special legislation, shall not so promptly forget it, that they shall respect the principle, even with respect to States with whom no treaty binds them, and that the commanders of naval vessels, who violate this principle, a result of the independence of nations, shall be severely punished.

How many times has Great Britain, which, by the act of 1764 and by its treaties of 1786 with France and 1794 with the United States,

has recognized the principle of the sovereignty of the State over the territorial sea up to a certain distance from the shore, violated this principle, even in *ports*?

Although the extent of the property or sovereignty over the territorial sea still appears to present some uncertainty, it does not exist to the extent indicated by the observations of Rayneval. Does not a common opinion of statesmen, as well as modern publicists exist, in view of the treaties which we have cited, and the local legislation which we have adduced, and the doctrine expressed by Grotius, Valin, Azuni, Klüber, etc., decide it? Can we not say with certainty:

First, that the sovereignty over the territorial sea reaches as far as the *range of cannon shot* from the shore, so far as concerns the protection which a neutral State owes to vessels of a belligerent nation; but the surveillance which ought to be exercised in the matter of customs, to prevent smuggling, may extend still further.

Second, this sovereignty extends over maritime regions, such as roadsteads, bays, gulfs, and straits, whose entrance and exit may be defended by cannon; over inclosed seas of different kinds in the territory, such as the Irish Sea, for example; finally, over all *closed waters*, according to the expression of the treaty of 1787 between France and Russia.

It follows from the principle of sovereignty of the State over the territorial sea, as an incontestable principle which can not be refused recognition, since it is deduced from the independence of nations, the necessity that each of them exercise over their coasts the surveillance and protection which insure the tranquillity and protection of the inhabitants and the surveillance of their property. It results from these principles, let us say—

First. That the exercise of internal police in ports belongs exclusively to the government of the territory. . . .

Second. That an enemy vessel can not be either taken or pursued either in ports, bays, or in the expanse of sea over which the jurisdiction of the neutral State extends, the space which general usage measures as the *range of cannon*. The ordinance of 1681 provided a corsair which shall pursue its prey into the mouth of a French river shall be treated as a *pirate*. . . . That at all times where reasons of state or any other governmental consideration requires that a sovereign forbid foreigners to navigate in the *territorial sea* he may legitimately do so without offending the law of nations. . . .

§ 41, page 97.—All gulfs and straits can not belong, *throughout their entire extent*, to the territorial sea of the State whose coasts they wash. The sovereignty of the State is limited over gulfs and straits of *wide* extent to the distance indicated in the foregoing section; beyond this, gulfs and straits of this category are assimilated to the sea and their use is free to all nations. Among the

gulfs and straits which may be considered as belonging to the *territorial sea*, subject to the laws and surveillance of the State by virtue of the right of self-preservation and the inherent independence which belongs to every State, we may place the following: The Sea of Azof, the Sea of Marmora, the Zuyder Zee, and the Dollart; the Gulfs of Bothnia and Finland; the Gulf of St. Lawrence, in North America; *a part* of the Gulf of Mexico, within the respective lines indicated by each of the States whose territory is bounded by that gulf; *the head* of the Adriatic Sea in the regions of Venice, Trieste, Fiume, etc.; the Gulf of Naples, Salerno, Taranto, Cagliari, Salonica, Koroni, Lepanto, etc.; the straits or channels of Scotland, Messina, the Sound and the Great and Little Belt, of Constantinople, the Dardanelles, etc.

As to straits and channels in which the ship which navigates them while remaining at the *center* of the channel finds itself beyond the *range of cannon*, these are recognized as free seas. Such are the Straits of Gibraltar, the English Channel, the Straits of Mozambique, Bering, Malacca, Davis, Bass, Torres; the Sound itself (although commercial navigation is subjected to certain dues) belongs to this category.

Straits being passages which connect seas, and permit of navigation from one sea to another, ought to be free in their use as the sea itself. If it were otherwise, the liberty of the seas connected by the straits would be only chimerical. There may exist, we agree with Rayneval, certain conventions or usages contrary to these assertions, but they are only exceptions, and the principle remains none the less intact.

DESPAGNET: Cours de Droit International Public. Fourth edition.
Paris, 1910.

§ 402, page 608.—In spite of the principle of the liberty of the seas, there are certain portions along the coasts which are universally considered as a prolongation of the territory of the State and over which the sovereignty, and even at times the property of the latter, is recognized. This maritime territory comprises various elements, whose legal status may differ. We shall examine them successively. But the reasons which justify the sovereignty of the State beyond the limits of its terrestrial territory are always the same. Perels summarizes them in three principles.

First. The security of the adjacent State requires that it shall have exclusive possession of its shores and that it may protect the approaches.

Second. The surveillance of vessels which enter, leave, or sojourn in its territorial waters is imposed by the guaranty of efficient police and the advancement of its political, commercial, and fiscal interests.

Third. Finally, the exclusive enjoyment of the territorial waters, e. g., for fishing and coastal trade, may be necessary to secure the existence of coastal populations.

§ 403.—*The territorial sea.* The territorial sea is that which is adjacent to the shore up to the limit where the State from the coast can effectively exercise its power by the force of arms. In spite of the anomaly of the expression *territorial sea*, it is fixed in usage rather than that of *littoral sea*, which has been proposed to replace it.

[The author then discusses the nature of the right of the adjacent State, whether *dominium* or *imperium*.]

§ 404.—*Extent of the territorial sea.* This extent must be reckoned from the shore, and we can not say anything more definite than that it is generally the normal limit of the greatest range of cannon, the adjacent State stationing its batteries as far out as the tides permit; but in order to fix a definite limit we must determine exactly the point of departure. Now this point of departure where the shore ends is regulated by the administrative law of each country, often incompletely and giving rise to great difficulties, particularly in France. In the conventions which fixed the territorial sea, particularly from the point of view of fishing, low-water mark is taken as the point of departure. (Convention of the Hague, May 6, 1882.) This is also the rule adopted by the British act of 1878 on jurisdiction in territorial waters. . . .

The limit of the territorial sea seawards has varied greatly. The old authors extend it very far, to exaggerated or ill-defined distances, some a hundred miles and others to the visual horizon. Bynkershoek first stated the principle that the power of the land ends where the force of arms ends. Today it is agreed that the limit of the territorial sea is fixed at the extreme point at which the State may, from the shore, compel respect for its sovereignty, that is, the greatest range of cannon. This range clearly varies according to the progress of ballistics, and it is now estimated at 20 kilometers.

Treaties may fix the limit *between the contracting States* for customs police, which is usually admitted in international conventions or municipal laws to extend to 4 or 5 leagues. Finally, numerous treaties already existing relating to fishing adopt 3 marine miles from low-water mark. (Hague Convention, May 6, 1882, art. 2; Declaration of Constantinople, Oct. 20, 1888, regarding the neutralization of the Suez Canal.)

We must remark that this last limit has been adopted because we have taken account of the older usual range of cannon. But we must not conclude from this that it constitutes the normal limit outside special conventions. The limit of common law always remains, excepting conventions to the contrary, the greatest range of cannon at the time in question. (See letter of Messrs. Courcel and Gram, arbitrators in the conflict between Great Britain and the United States on the question of fishing on the Bering Sea, *Annuaire de l'Institut de droit international*, vol. 13, p. 282.)

The limit of the greatest range of cannon, however logical it may be, since it corresponds to the effective action of the sovereign over the sea, deserves serious criticism. It is quite uncertain and very variable, following the latest improvements in ballistics. As it increases corresponding to the latest improvements in artillery, it is purely theoretical for many countries which do not possess cannons of the latest model or even have none at all on their coasts. Besides, we take account of the *absolute* range of projectiles and not their *effective* range, which is far from being so great. From the legal point of view, finally we would logically have to decide that the assertion of sovereignty in a zone so extended implies a correlative obligation on the part of the adjacent State to completely exercise in that zone its domination and to fulfill in it all its duties; for example, from the point of view of the police of navigation and the safety of vessels. Now, such a burden would clearly be inadmissible. It has also been sought to find a limit of the territorial sea which would take a reasonable middle ground between that of 3 miles, fixed in the majority of treaties on fishing and the legislation of certain States (British act, 1878), but which seems too narrow, and that of the greatest range of cannon, which is excessive. After fruitless attempts at Hamburg and at Geneva in 1891-92, the Institute of International Law succeeded in adopting the following resolution in 1894 at its Paris session: "The territorial sea extends to 6 *marine* miles from low-water mark along the coast." This extent of the territorial sea is in most cases sufficient and could be adopted by the States.

In spite of all limitations of the territorial sea within the range of cannon, it is well understood that the State may forbid acts of hostility carried on in the open sea within a radius which may affect its shores when it is neutral. It is to assure this *line of respect of neutrality* that the institute voted the following resolution:

In case of war, the adjacent neutral State has the right of establishing its neutral zone beyond this 6 miles up to the range of cannon, either by declaration of neutrality or by special notification. (Art. 4.)

§ 405.—*Ports, harbors, and roadsteads.* In like manner, as among the Romans, these dependencies of the maritime territory are in all modern countries a part of the domain of the State in like title as the shores and derelictions of the sea. They are, therefore, subject to a right of property, and not merely of sovereignty. . . .

§ 406.—*Gulfs and wide bays.* Over gulf and wide bays the State no longer has a right of property. It can only exercise the right of sovereignty. This last right is, moreover, subordinated to the condition that the effective power of the State may be exercised throughout the entire extent of the gulf or bay, which can not exceed the total range of cannon from its two shores. In conventions or State laws, especially so far as concerns the monopoly of fishing, we often adopt a rule by virtue of which the right of sovereignty is exercised in an absolute manner only over bays whose width does not exceed 10 miles. (See Franco-British Convention of Aug. 2, 1839, and the French law of May 6, 1882, Art. 2, covering fishing in the North Sea.)

Wide gulfs beyond the range of cannon ought to be assimilated to the high seas. We can not, therefore, admit the claim of the United States over the Gulf of Mexico and over Hudson Bay any more than the English theory of Kings Chambers or Narrow Seas, according to which the entire space of sea contained between two shores belonging to one State is under the sovereignty of that State.

Thus the English sought to make of the Irish Sea an English sea under the same title as the arms of the sea between Great Britain and the Isle of Wight; and by the Ordinance of 1872, it considered as such the Bay of Conception in Newfoundland, which extends 40 miles inland and is 15 miles wide.

As *lex ferenda*, the Institute of International Law adopted the following resolution at its Paris session in 1894: "For bays the territorial sea follows the sinuosities of the coast, except that it is measured from a straight line drawn across the bay at its narrowest part toward the sea, where the distance between the two shores of the bay is 12 marine miles, unless continuous and established usage shall have sanctioned a greater width." (Art. 3.) This last reservation contemplated bays more than 12 miles wide, which by reason of their situation or importance have always been claimed in fact as the territorial sea of the adjacent States; for example, the Firths of Scotland, the Fiords of Norway, the Bay of Cancale (17 miles wide), the Bay of Chaleur in Canada (16 miles wide). The width of 12 miles was proposed to harmonize with the extent of 6 miles adopted for the territorial sea, the bay becoming in its entirety subject to the State which surrounds its two shores and which may include it within the zone of its territorial sea. This symmetry is not of great practical value. In treaties and laws covering fishing we extend the sovereignty in bays as far as the point at which the

distance between the two shores reaches 10 miles and not 6 miles, although the extent of the territorial sea in some cases is ordinarily fixed at 3 miles. This is because reasonable account has been taken of the results of experience, which permit the assertion that the bay may be effectively controlled from the two shores so long as the space between them does not exceed 10 miles.

It has been demanded that the mouths of rivers, whatever their width, be assimilated to the rivers themselves, and not to the territorial sea (*Annuaire*, vol. 13, p. 294); but how shall we regulate the situation of the mouth of a river, which in reality is only a line separating the river from the sea? In fact, bays into which rivers empty are not subjected to the régime of the latter. This is particularly the case with the mouth of the Danube, according to the treaty of March 30, 1866. We may also say, in the absence of a contrary convention, that there is no reason for not treating bays constituting the mouths of rivers like other bays.

§ 411, page 623. *The right of fishing.*—In the open sea fishing is absolutely free for all States. We no longer seriously take account to-day of claims to a monopoly of fishing, such as those which Denmark formerly asserted over all the seas of Greenland and Iceland; and which treaties sanctioned, even in the seventeenth century, claims such as those which Selden upheld for Great Britain.

In the territorial seas, on the contrary, it is understood that every State reserves to itself an absolute monopoly of the right of fishing in the interest of its coastal population, because the area in question is one of exhaustible use and susceptible of individual appropriation, differing thus from the right of pacific navigation, which has not the same characteristics and can not be raised against other States.

In fact, from the point of view of practical value, States may be divided into three categories:

(a) The right of fishing exclusively for nationals in territorial waters in Great Britain, Spain, and France, since the law of March 1, 1888, induced by the great competition which was open to foreign fishermen.

(b) Special favors given to nationals by laws or treaties, without excluding aliens (Belgium, Sweden and Norway).

(c) Liberty of fishing for all (Netherlands, Greece, and the United States).

In the municipal statutes as well as in the treaties, the limit of the territorial waters for fishing is ordinarily fixed at 3 geographic miles—that is, 60 to a degree of latitude—from low-water mark. This radius is measured for bays from a straight line drawn across the bay in the part nearest the entrance, at the first point in which the width does not exceed 10 miles. (See Hague Conven-

tion, May 6, 1882, arts. 2 and 3; French law of Mar. 1, 1888, art. 1; decree of Mar. 5[?],¹ 1888, for Algeria.) Certain countries for whom fishing constitutes an important industry fix a greater extent as the limit to their territorial sea for fishing. . . .

FIORE: *International Law Codified and Its Legal Sanction, or The Legal Organization of the Society of States.*

[Translation from the fifth Italian edition by Edwin M. Borchard. New York, 1918.]

RIGHT OF SOVEREIGNTY OVER TERRITORIAL WATERS.

Page 178.—265. The territorial sea must be considered as constituting a part of the domain of the State to which the coasts belong. By virtue of this eminent domain, every State has the exclusive right to provide for the security and defense of the territory of the State, the protection of the private interests of its citizens, the free carrying on of commerce, and the protection of the general and fiscal interests of the State.

No State can, however, assume the right to prohibit the inoffensive use of its territorial waters.

266. Every State has the exclusive right to regulate the patrol of navigation within territorial waters, the approach to the coasts, the entrance into ports, the obligation to take a local pilot, free pratique, and all similar matters. It is incumbent upon it to establish a strict supervision so as to insure compliance with the laws and regulations by providing punishment for those who infringe them.

267. The right to fish and collect all under-water products within territorial waters may be reserved for citizens, except when treaties extend the fishing privilege to foreigners.

Fishing in territorial waters is generally regulated by commercial treaties and by special conventions covering the matter. In several treaties concluded by Italy, fishing in Italian territorial waters is reserved for her citizens. It is so stipulated in the treaty with Austria-Hungary of December 6, 1891, article 18, and in the treaty with Mexico of April 6, 1890, article 17, and others. The delimitation of the fishing limits in the bay of Mentone was determined by the convention of June 18, 1892, between Italy and France. There are many instances of treaties where the reservation of the exclusive right of citizens to fish in territorial waters is not stipulated. It is always necessary to refer to special conventions, to decide whether or not such reservation has been made. In principle, in the absence of a treaty of commerce, the privilege ought to be recognized as reserved to citizens. Compare Oppenheim, *International Law*, I, § 187.

¹ July 9. See *Journal officiel*, July 13, 1888.

268. Let us suppose that by the law of a State fishing in territorial waters is reserved to citizens, and in a special treaty concluded with another State the right of fishing is granted to the citizens of that State. If, in the commercial treaty concluded with another State the right of fishing is not expressly reserved to citizens, and if the treaty contains the clause under which the contracting parties are assured the privileges of the most favored nation, the reservation based on the law granting citizens alone the right to fish in territorial waters should not be considered as impliedly renounced on the ground that the right of fishing has been granted in a treaty concluded with another State.

The French law of March 1, 1885 prohibits foreigners from fishing in the territorial waters of France and Algeria and reserves this right to French citizens. Now, let us suppose that a State, such as France, reserves fishing in its territorial waters to its citizens and that, afterward, by a treaty concluded with State A, it stipulates that fishing in the respective territorial waters shall be permitted under reciprocity to the citizens of the two contracting parties. Let us suppose, furthermore, that in a later treaty concluded with State B there is inserted the most favored nation clause. In such instances, could it be held that, by reason of such clause, the citizens of State B could claim the right of fishing conceded to State A? Derogations from the general law reserving fishing to citizens may only be sought in a special law, and as special laws derogating from the general law are strictly interpreted, it cannot be admitted that the derogation contained in the special concession to State A should apply to other powers. It would in fact require another special express provision in favor of another State to furnish a derogation in its favor, from the general law reserving fishing in territorial water to citizens.

269. The sovereign of every State also has the right to reserve the coasting trade to citizens. This right must be considered as reserved, whenever it has been established by law or custom and no derogation therefrom has been suffered by treaty.

The expression "coasting trade" denotes the transportation of merchandise and passengers between two parts of the same State. This trade as a rule is reserved exclusively for national ships. We believe, however, that as the right of free, peaceful navigation over the territorial sea is now conceded, the privilege cannot be sustained except by virtue of a special law of the State or established custom. The rule reserving the coasting trade to citizens is generally adopted in all European States; in Germany, by the law of May 22, 1881; in Spain, by the ordinance of July 15, 1870, and in France, by the law of April 2, 1889. In England, an order in council prohibits the coasting trade to vessels of countries which do not admit reciprocity. In the United States, foreign vessels are absolutely excluded from the coasting trade. On the other hand, in Belgium, the coasting trade is free

because there is no law prohibiting it. In Italy, by the law of July 11, 1904, No. 167, the coasting trade is reserved to the national flag, provided no special conventions or treaties stipulate otherwise. Compare: Oppenheim, *International Law*, v. I, §§187-188.

270. The State has the right to regulate transit in territorial waters in order to provide for the necessities of its defense and to protect its fishing interests and to prohibit the transportation of certain goods (arms, ammunition, alcohol, etc.) and in general any transportation which may be suspected of violating the customs laws. It may, therefore, subject foreign vessels entering territorial waters to visit and inspection in order to prevent any violation of the laws and regulations against smuggling.

This rule may find application with respect to the trade in fire-arms, munitions of war, and alcoholic drinks intended for Africa. Since experience has proved that the importation of such goods greatly imperils the security of the States which exercise rights of sovereignty or protection in Africa, it was agreed that, independently of the agreement concluded under the general Act of the Conference of Brussels of July 2, 1890, any State could by law forbid the transportation of such merchandise in the territorial waters of its African possessions and declare it smuggling and punish it as such.

271. The right of control and patrol of a State over its territorial waters may be properly exercised by subjecting merchant vessels suspected of carrying on smuggling to the visit of its war vessels or those specially designated for the purpose, and by applying the penalties provided by law (fines, confiscation of merchandise, etc.) to those found guilty of that offense.

The application of police measures and regulations shall always be permissible in the territorial waters of any State for the protection of its fishing interests and the observance of its customs laws.

A special law is indispensable for the exercise of such a right; because the application of penalties is not, in principle, admissible without a statute. Great Britain has a special law on this matter, that of August 28, 1833, which prohibits the violation of customs regulations. Under this law, merchant vessels found in British territorial waters are considered as suspects whenever they deviate from their route to their port of destination and can not justify such deviation by the condition of the weather and sea. They may be liable to penalties to the extent of confiscation of their merchandise, when they fail to comply with the notice to retire within 48 hours. In France, they apply the law of Germinal 4, year 2, article 7, title 11, which provides the penalty of confiscation of goods whose importation into France is prohibited, when these goods are found on board a merchant ship in French territorial waters, and which inflicts, besides, a fine of 500 francs on the captain of such vessel.

EXTENT OF THE TERRITORIAL SEA.

272. By customary law, territorial waters extend 3 sea miles from low water mark.

Nevertheless, we must recognize the common advantage in extending the territorial sea to at least 5 miles from the coast, so as more effectively to safeguard the rights of the littoral States.

The 3-mile limit is at the present time considered as generally fixed to determine the maritime zone over which a State may exercise its jurisdiction. See Calvo, *Droit international public*, § 355, 4th ed., 1887. "This zone," he says "is the limit which has been generally recognized by international conventions, notably by article 1 of the treaty of October 20, 1818, between Great Britain and the United States; by the Belgian law of June 7, 1832; by articles 9 and 10 of the treaty of August 2, 1839, and Article 1 of the treaty of November 11, 1867, between France and Great Britain."

To-day, the tendency is to extend the limit of the territorial sea especially with a view to insuring a better defense, the necessities of which have grown greater by reason of the progress in the means of attack and range of guns. Nevertheless, an international convention is needed to modify customary law. The Government of the Netherlands, in 1895, took the initiative in negotiating for an extension of the territorial sea to 6 miles from the coast. This was also the proposition advanced by the Institute of International Law in 1894 at the Paris session.

273. No State can by a special law extend the territorial sea beyond the limits established by customary law.

If, however, a State has proclaimed by municipal law that its territorial waters in the matter of the exercise of police and fishing jurisdiction, are to be considered as extending beyond 3 miles (6 at the utmost) and if the other States have not protested, the State's exercise of police jurisdiction and supervision of customs within the limits thus fixed cannot be disputed, unless a court of arbitration decides to the contrary.

Certain States have, in fact, extended the limits of the territorial sea from the point of view of the dominion which they claim over it. Great Britain proclaims and exercises its right of supervision to 12 miles from the coast. In France, the zone for the supervision of customs was carried to 2 myriameters by the law of March 27, 1817 (Art. 13). We cannot admit, however, that the rules of international law can be modified by a unilateral act.

Nevertheless, we may observe that, on the one hand, the majority of publicists recognize the necessity of extending the territorial sea to at least 5 sea miles from the coast, and that, on the other hand, certain States, in fact, have by municipal law enlarged the limits of their territorial waters for the exercise of their jurisdiction. Under such circumstances of fact, it

would seem that, although not admitting that a State may assume the right to modify by a municipal law the rule of international law relating to the width of the territorial sea without exposing itself to the just protests of the other powers, yet it may be said that everyone may rely upon the common opinion of writers and on fact, to practice what others practice. In this way, the adoption of a different customary law as regards the extent of the territorial sea may gradually be arrived at, or else, on account of the just protests of third powers, the necessity will arise of referring to the decision of an arbitral court the question as to whether or not a State may assign a greater extent to its territorial sea for the exercise of its jurisdiction. Of course, through its award, the Court would lay down a rule obligatory on all the States until such time as they may agree to establish rational rules for determining the extent of the territorial sea and their reciprocal rights in relation to it.

274. The territorial sea can be extended by a treaty designed to regulate the application of customs laws and the reciprocal right of supervision and control of the respective governmental authorities of the contracting States.

Such conventional extension should be deemed operative only between the contracting parties.

Sée the Anglo-American treaty of October 20, 1818, those between France and Great Britain of August 2, 1839 (arts. 9 and 10), and November 11, 1867 (art. 1), and the treaty between France and Mexico of November 27, 1886, by which it was agreed to extend respectively the territorial sea to 20 kilometers. Compare: Ortolan, *Règles internationales et diplomatie de la mer*, 1864, livre II, ch. VIII, v. I, p. 159. Pradier-Fodéré, *Droit internat. public*, v. II, § 633; Bonfils, *op. cit.*, § 492. Cf. Oppenheim, *International Law*, v. I, 2d ed., pp. 235 *et seq.*, §§ 176–197.

275. As regards bays, the distance of 3 sea miles shall be reckoned from a straight line drawn across the bay where its shores converge to a distance of 6 marine miles.

JUST LIMITATIONS OF THE RIGHT OF DOMINIUM.

276. The eminent domain which every State has in its territorial waters can not be considered as a right of property. Since its object is the security and the defense of the general and individual interests of its citizens, it must be limited by its purpose.

277. Every State is bound to exercise its right of domain over territorial waters in such a manner as not to injure the rights of vessels who make a peaceful and harmless use of such waters for the purposes of navigation. It is a universal right, in times of peace, freely to traverse territorial waters in order to reach the open sea.

278. No sovereign has the right to subject merchant vessels crossing territorial waters to the payment of fees, under any form whatever, for the right of transit or navigation, nor by law or regulation render transit oppressive and difficult.

CRIMINAL JURISDICTION OVER TERRITORIAL WATERS.

Page 191.—306. It is incumbent upon States to determine in common accord the extent of territorial waters with respect to criminal jurisdiction.

In principle, the complete assimilation of territorial waters to the landed territory, from the point of view of the authority of criminal law over offenses committed in the said waters and the resulting criminal jurisdiction, should not be admitted.

307. In the absence of an international agreement, every State can by law establish rules for the exercise of criminal jurisdiction over offenses committed within its territorial waters.

In Great Britain, this matter is regulated by a law of 1878 (*An act to regulate the law relating to the trial of offenses committed on the sea within a certain distance of Her Majesty's dominions*, 41 and 42 Vict., c. 73). Article 7 of this law reads: "And for the purpose of any offense declared by this Act to be within the jurisdiction of the Admiral, any part of the open sea within one marine league of the coast measured from low water mark shall be deemed to be open sea within the territorial waters of Her Majesty's dominions."

This law was enacted following the discussions arising out of the collision owing to negligent navigation of the German ship *Franconia*, at a distance of about three sea miles off the English coast. The killing of a sailor having been proved and charged against the captain of the vessel, the claim was made that the English law was applicable and that the High Court of Admiralty had jurisdiction of the case. At that time, that is in 1877, no statute relating to this matter existed in Great Britain and the discussions involved the general principles of law. Phillimore, a judge of the High Court, held, with much reason, that from the point of view of criminal jurisdiction, territorial waters could not be assimilated in all matters to the landed territory. [See *Regina v. Keyn*, 2 Ex. D. 63.]

At the time of the debates on the law of 1878, the principle which it was intended to sanction was bitterly opposed both in the House of Lords and in the House of Commons. In the latter, the law was opposed by Sir George Bowyer. Phillimore persistently held that the British Parliament could not establish a criminal jurisdiction in opposition to international law, and that was the opinion held by the Lord Chief Justice.

308. It must always be considered in conformity with the most just principles of international law to admit the criminal jurisdiction of the State over offenses committed in territorial waters within a mile from the coast measured from low-water mark, and beyond

that limit, to assimilate territorial waters to the high sea from the point of view of criminal jurisdiction.

This rule is based on the idea and ultimate purpose of the penalty. The political alarm and damage which justify the penal sanctions necessary for the legal protection of violated rights, cannot arise from acts which are committed at a great enough distance from the coast to exclude any idea of threatening the public safety of the territory of the State.

TERRITORIAL WATERS.

Page 416.—1039. Territorial waters, that is to say, those contained between the shores of a State and the line that constitutes its maritime or river boundary, must be deemed to be in the juridical possession of the territorial sovereign. That sovereign has the right in these waters to regulate navigation, transit, the landing of national and foreign vessels according to the established laws and regulations, and to insure their enforcement, without, however, preventing or obstructing the peaceful use of the said waters.

See with respect to the right of dominion of the sovereign State over territorial waters, rules 265 *et seq.*; on criminal jurisdiction, see rules 306 *et seq.*

GROTIUS: *De Jure Belli ac Pacis*. Amsterdam, 1646.¹

Book II, Chapter III, section 13, pages 129–130.—Mere control of a part of the sea without any other right of possession could easily have been assumed; and I do not think that that law of nations, of which we have spoken, is a hindrance to such procedure. . . . Now the lordship over a portion of the sea is acquired in the same way as other lordships—that is, as we have said above, by way of persons and by way of territory. By way of persons, when a fleet, which is a sea army, is established somewhere in the sea; by way of territory, in so far as those who navigate in that part of the sea nearest the land can be held in restraint from the land, no less than if they were found upon the land itself.

HALL: *A Treatise on International Law*. Seventh edition, 1917.

Page 130.—It may be worth while to notice, though the fact is an obvious result of the position occupied by a protecting state, that the territorial waters of the protected territory are, as between the protecting state and foreign countries, under the control of the former

¹ A photographic reproduction of this 1646 edition appears in the *CLASSICS OF INTERNATIONAL LAW*, Washington, 1913.

in the same manner as are its own waters, to the extent and within the scope that are consequent upon the powers assumed by it within the protected territory.

Page 144.—§40. It has become an uncontested principle of modern international law that the sea as a general rule cannot be subjected to appropriation. It is at the same time almost universally considered that portions of it are affected by proprietary rights on the part of the states of which the territory is washed by it; but no distinct understanding has yet been come to as to the extent which may be appropriated, or which may be considered to be attendant on the bordering land. In order to comprehend the uncertain application which the rights of appropriation and of retention as property thus receive in relation to the sea, it is necessary to form a clear conception of the manner in which the views now commonly held have been gradually arrived at.

At the beginning of the seventeenth century it is probable that no part of the seas which surround Europe was looked upon as free from a claim of proprietary rights on the part of some power, and over most of them such rights were exercised to a greater or less degree. In the basin of the Mediterranean the Adriatic was treated as part of the dominion of Venice; the Ligurian sea belonged to Genoa, and France still claimed to some not very well-defined extent the waters stretching outwardly from her coast. England not only asserted her dominion over the Channel, the North Sea, and the seas outside Ireland, but more vaguely claimed the Bay of Biscay and the ocean to the north of Scotland. The latter was disputed by Denmark, which considered the whole space between Iceland and Norway to belong to her. Finally, the Baltic was shared between Denmark and Sweden.¹ In their origin these claims were no doubt founded upon services rendered to commerce. It was to the advantage of a state to secure the approaches to its shores from the attacks of pirates, who everywhere swarmed during the Middle Ages; but it was not less to the advantage of foreign traders to be protected. A right of control became established and recognized; and in attendance upon it naturally came that of levying tolls and dues to recompense the protecting State for the cost

¹ Daru, *Hist. de Venise* (written in 1819), liv. v, § 21; Selden *Mare Clausum*, lib. ii. cc. 30-32; Loccenius, *De Jure Marit.* lib. i. c. 4. In 1485 it was agreed in a treaty between John II of Denmark and Henry VII that English vessels should fish in and sail over the seas between Norway and Iceland on taking out licences, which required to be renewed every seven years (Selden, *loc cit.* c. 32). In the sixteenth century intestine wars in Scandinavia led to so long an enjoyment of the fisheries of the northern seas without licence by the English, that the latter set up a title to their use by prescription, in addition as it would seem to the claim of exclusive sovereignty over the seas in which they lay. Denmark maintained her pretensions, and some ill-treatment of English fishermen by the Danes gave rise to a serious dispute between the two countries (*Justice, Dominion, and Laws of the Sea*, written in 1705, p. 168; and Rymer, *Foedera*, xvi. 395).

and trouble to which it was put. From this, as a dissociation of the ideas of control and property was not then intelligible, the step to the assertion of complete rights of property was almost inevitable. The acts of control, it must be remembered, apart from those required for the protection of commerce, were often not only very real, but quite as solid as those upon which a right of feudal superiority was frequently supported. In 1269, for example, Venice began to exact a heavy toll from all vessels navigating the Northern Adriatic. After paying the impost for a few years, Bologna and Ancona took up arms to free themselves from the burden, but the issue of their wars being unfortunate, they were compelled formally to acknowledge the sovereignty of Venice over the Adriatic, and to consent to pay the dues which she demanded. In 1299, it appears from a memorial presented to certain commissioners sitting in Paris to redress damages done to merchants of various nations by a French Admiral within the English seas, that procurators of the merchants and mariners of Genoa, Catalonia, Spain, Germany, Zeeland, Holland, Friesland, Denmark, and Norway, acknowledged that exclusive dominion over the English seas, and the right of 'making and establishing laws and statutes and restraints of arms' and 'all other things' which may appertain to the exercise of sovereign dominion over them, were possessed by England. For nearly three centuries afterwards England kept the peace of the British seas either by cruisers in constant employment, or by vessels sent out from time to time.¹

At the period, then, when international law came into existence, the common European practice with respect to the sea was founded upon the possibility of the acquisition of property in it, and it was customary to look upon most seas as being in fact appropriated. But during the preceding century the exorbitant pretensions of Spain and Portugal had been preparing a reaction against this view. The former asserted dominion over the Pacific and the Gulf of Mexico, the latter declared the Indian Ocean and all the Atlantic south of Morocco to belong to it; while both pushed the exercise of proprietary rights to the extent of prohibiting all foreigners from navigating or entering their waters.² The claims of Portugal and

¹ Daru, *Hist. de Venise*, loc. cit.; Boroughs, *The Sovereignty of the British Seas* (1633), p. 28, and *Justice*, 134. The narrow seas were 'constantly kept' in the time of Boroughs, but at that date the ships so employed seem to have been stationed mainly for the purpose of receiving the salute. He, however, expressly says that within his memory ships were sent out to keep the peace of the seas, p. 61.

² Charles V styled himself "Insularum Canariæ, necnon Insularum Indiarum et terræ firmæ, maris, oceanî, etc., rex." Selden, *Mare Clausum*, cap. 17. Ortolan (*Dép. de la Mer*, i, 121) gives the text of a Portuguese Ordonnance of pains and penalties: "Assi natural como estrangeiro, ditas partes, terras, mares, de Guinéa et Índias, et quaisquer outras terras et mares et lugares de nossa conquista, tratar, resgatar, nem guerrear, sem nossa licença et autoridade sob pena que fazendo o contrario moura por ello morte natural et por esso mesmo feito percão para nos todos seus beens moveis et de rays."

Spain received a practical answer in the predatory voyages of Drake and Cavendish, and the commerce of Holland with the East; and in the region of argument they were met by the affirmation of the freedom of the seas. When Mendoza, the Spanish envoy at the English court, complained to Queen Elizabeth of the intrusion of English vessels in the waters of the Indies, she refused to admit any right in Spain to debar her subjects from trade, or from "freely navigating that vast ocean, seeing the use of the sea and air is common to all; neither can a title to the ocean belong to any people or private persons, forasmuch as neither nature nor public use and custom permitteth any possession thereof."¹ Elizabeth was indifferent to consistency. If the principle which she enunciated was correct, it applied as fully to the British seas as to those of the Indies. It was essentially the same as that on which Grotius relied in his attack upon the Portuguese in the *Mare Liberum*. All property, he says, is grounded upon occupation, which requires that movables shall be seized and that immovable things shall be inclosed; whatever therefore can not be so seized or inclosed is incapable of being made a subject of property. The vagrant waters of the ocean are thus necessarily free. The right of occupation, again, rests upon the fact that most things become exhausted by promiscuous use, and that appropriation consequently is the condition of their utility to human beings. But this is not the case with the sea; it can be exhausted neither by navigation nor by fishing, that is to say, in neither of the two ways in which it can be used.²

The doctrine with which the the pretensions of Spain and Portugal was met went further than was necessary for the destruction of those pretensions, and it went further than any nation except Holland, which was imprisoned within the British seas, cared much to go. The world was anxious to secure the right of navigation, but it was willing that states should enjoy the minor rights of property and the general rights of sovereignty which accompany national ownership. Selden combated the views of Grotius in the interests of England; but while he maintained the right of appropriation in principle and as a customary fact, he declared that a state could not forbid the navigation of its seas by other peoples without being wanting to the duties of humanity.³ The remaining jurists of the seventeenth century are in agreement with him. Molloy may be exposed to sus-

¹ Camden, *Hist. of Eliz.*, year 1580.

² *Mare Liberum*, cap 5. The treatise was first published in 1609. In his subsequent work, *De Jure Belli*, the doctrine is repeated (lib. II. cap. II. § 8), but with the illogical qualification (cap. III, § 8) that gulfs and straits of which both shores belong to the same power can be occupied, because of their analogy to rivers, provided that the area of water is small in comparison with that of the land upon which it is attendant.

³ *Mare Clausum*, lib. I, c. 20.

picion as an Englishman, but the opinion of Loccenius and Pufendorf is independent.¹ The latter argues that fluidity is not in itself a bar to property, as is proved by the case of rivers; that though the sea is inexhaustible for some purposes, its fish, and the pearls, the coral, and the amber that it yields, are not inexhaustible, and that 'there is no reason why the borderers should not rather challenge to themselves the happiness of a wealthy shore or sea than those who are seated at a distance from it; finally, that the sea is a defence, 'for which reason it must be a disadvantage to any people that other nations should have free access to their shores with ships of war without asking their leave, or without giving security for their peaceful and inoffensive passage.' The extent over which dominion exists in any particular case is to be determined from the facts of effective possession or from treaties; and in cases which, after the application of these tests, are doubtful, it is to be presumed that the sea belongs to the states bordering on it so far as may be necessary for their defence, and that they also own all gulfs and arms.

In practice there was no radical change during the earlier part of the seventeenth century, except that as the seas had become safer, it was no longer necessary to keep their peace. Those consequences of the existence of property which made for the common good disappeared, while those which were onerous remained. Venice preserved her control over the Adriatic, and so jealous was she even of the semblance of a derogation from it, that in 1630 the Infanta Maria, when about to marry the King of Hungary and son of the Emperor, was not allowed to go to Triest on board her brother's fleet, but was obliged unwillingly to accept the hospitality and the escort of Venetian vessels.² In 1637 Denmark seized vessels placed outside Dantzic by the King of Poland to levy duties on merchantmen entering; she also increased the dues payable on passing the Sound, apparently to an excessive point, since wars with Sweden, Holland and the Hanse Towns followed, which resulted in the exemption of Swedish ships, and in the regulation of the amount to be paid by the Dutch; and there can be little doubt that Danish pretensions in the northern seas were maintained, since the disputes with England which occurred in the sixteenth century were renewed, as will be seen presently, in the eighteenth.³ England continued to require that foreigners intending to fish in the German

¹ Molloy (1646-1690), *De Jure Marit.* cap. 1; Loccenius, lib. 1. cap. iv; Pufendorf, bk. iv. ch. iv. §§ 6-9.

² Daru, *Hist. de Venise*, loc. cit.

³ Treaty of Christianopol, 1645 (Dumont, *Corps Universel Diplomatique du Droit des Gens*, vi. 1. 312), and of Bromsebro in the same year (*id.* 314).

ocean should take out English licences, and when the Dutch attempted in 1636 to fish without them, they were attacked and compelled to pay £30,000 for leave to remain.¹ Though a refusal to accord the honors of the flag, by which maritime sovereignty was symbolised, in part caused the war of 1652 between England and Holland, and furnished a pretext for that of 1672, the latter power in the first instance only endeavored to escape from performing a humiliating ceremony as due to a commonwealth which it admitted would have been due to an English king; and in the end it acknowledged its obligation in the Treaties of Westminster of 1654, of Breda, and of Westminster of 1674, in the last of which it was expressly recognized that the British seas extended from Cape Finisterre to Stadland in Norway.²

Between the beginning and the end of the seventeenth century however, notwithstanding the strenuousness with which England upheld her title to the British seas, so far as the salute due to her flag was concerned, there was on the whole a marked difference in the degree to which proprietary rights over the open sea were maintained. At the latter time they were everywhere dwindling away. By the commencement of the nineteenth century they had almost disappeared. England was embarrassed by the shadow of her claims, but she made no serious attempt to preserve the substance. The negotiations with the United States for a settlement of the question of the right of search, which had almost been brought to a satisfactory conclusion in 1803, were broken off at the last moment because the English Government could not make up its mind to concede freedom from search within the British seas;³ and

¹ Proclamation of 1609 and "The Proclamation for restraint of Fishing upon His Majesties Seas and Coasts without Licence" of May 10, 1636, ap. translation of the *Mare Clausum* by J. H. Gent, 1663. Hume, *Hist. of England*, ch. lli.

² Lingard, *Hist. of England*, vol. xi. ch. li; Hume, *Hist. of England*, ch. lxxv; Dumont, vi. li. 74, vii. i. 44 and 253. It was stipulated in the Treaty of Westminster that "praedicti Ordines Generales Unitarum Provinciarum debite, ex parte sua agnoscentes jus supra memorati Serenissimi Domini Magnae Britanniae Regis, ut vexillo suo in maribus infra nominandis honos habeatur, declarabunt et declarant, concordabunt et concordant, quod quaecunque naves et navigia ad praefatas Unitas Provincias spectantia, sive naves bellicae, sive aliae eaeque vel singulae, vel in classibus junctae, in ullis maribus a Promontorio Finis Terrae dicto usque ad medium punctum terrae van Staten dictae in Norwegia quibuscumque navibus aut navigiis ad Serenissimum Dominum Magnae Britanniae Regem spectantibus, obviam dederint, sive illae naves singulae sint, vel in numero majori, si majestatis Britannicae, sive aplustrum, sive vexillum Jack appellatum gerant, praedictae Unitarum Provinciarum naves aut navigia vexillum suum e mali vertice detrahentes supremum velum demittent, eodem modo parique honoris testimonio, quo ullo unquam tempore, aut in alio loco antehac usitatum fuit, versus ullas Majestatis Britannicae suae aut antecessorum suorum naves ab ullis Ordinum Generalium suorumve antecessorum navibus."

Even crowned heads in person were expected to make practical acknowledgment of the dominion of England. Philip II of Spain, when coming to marry Queen Mary, was fired into by the English Admiral who met him for flying his own royal flag within the British seas; and in 1606 the King of Denmark, when returning from a visit to James I, was met off the mouth of the Thames by an English captain, who forced him to strike his flag (Admiralty Records).

³ Mr. King to Mr. Madison, *British and Foreign State Papers*, 1812-14, p. 1404.

so late as 1805 the Admiralty Regulations contained an order to the effect that 'when any of His Majesty's ship shall meet with the ships of any foreign power within His Majesty's seas (which extend to Cape Finisterre) it is expected that the said foreign ships do strike their topsail and take in their flag, in acknowledgment of His Majesty's sovereignty in those seas; and if any do resist, all flag officers and commanders are to use their utmost endeavours to compel them thereto, and not suffer any dishonour to be done to His Majesty.' Since no controversies arose with respect to the salute at a time when opinion had become little favorable to the retention of such a right, it may be doubted whether the order was not allowed to remain a dead letter; and from that time, at any rate, nothing has been heard of the last remnant of the English claims. The pretensions of Denmark to the northern seas shrank in the course of the eighteenth century into a prohibition of fishery within 69 miles of Greenland and Iceland; but the seamen of England and Holland disregarded the Danish ordinances; when their vessels were captured they were supported by their governments; and though some threats of war were uttered, in the end the fishing-grounds were tacitly opened.¹ The Baltic was the only other of the larger seas in which any endeavor was made to keep in existence the old proprietary rights. Denmark and Sweden tried to shut it against hostilities between powers not possessing territory on its shores, but the attempt failed before the maritime predominance of England, and the claim may be considered to have been abandoned with the commencement of the last century.²

A new claim subsequently sprang up in the Pacific, but it was abandoned in a very short time. The Russian Government published an Ukase in 1821 prohibiting foreign vessels from approaching within a hundred Italian miles of the coasts and islands bordering upon or included in that ocean north of the 51st degree of latitude on its American, and of the 45th degree on its Asiatic shore; and it appears from a despatch addressed by the Russian Representative in the United States to the American Government that Russia conceived herself to be at liberty to regard the whole extent of sea north of the points indicated as being territorial. The pretension was, however, resisted by the United States and Great Britain, and was entirely given up by Conventions made between Russia and the

¹ Denmark nominally continued to claim a breadth of 20 miles off the coasts of Iceland until 1872; by the fishing regulations of that year she voluntarily accepted the ordinary 3-mile limit.

² In 1780 Denmark declared that "le Roi a résolu, pour entretenir la libre et tranquille communication entre ses Provinces, de déclarer que la mer Baltique étant une mer fermée, incontestablement telle par sa situation locale," etc. (De Martens, *Rec.* iii. 175); and in 1794 Sweden and Denmark agreed by a convention that "la Baltique devant toujours être regardée comme une mer fermée et inaccessible à des vaisseaux armés des parties en guerre éloignées est encore déclarée telle de nouveau par les parties contractantes décidées à en préserver la tranquillité la plus parfaite" (*id.* v. 608).

former powers in 1824 and 1825.¹ More recently the United States, since acquiring possession of the Russian territories in America, has endeavored to separate the Behring Sea in its legal aspect from the Pacific Ocean, and has claimed as attendant upon Alaska, by virtue of cession from Russia, about two-thirds of its waters, a space 1,500 miles long and 600 miles wide. The disputes with Great Britain which ensued, and the fact that they were submitted to the decision of a Court of Arbitration, are too well known to call for more than the barest reference. It is sufficient to note that the proprietary or territorial claim was tacitly dropped at an early stage of the proceedings, and that a pretension to jurisdictional rights of control for certain purposes, resting on a totally different basis, was substituted for it, or was at least insisted upon in its place.²

If we turn from history to the treaties of the eighteenth century the tendency to narrow the range of maritime occupation is perhaps still more strongly pronounced, though from the principles laid down being much too large to allow of admitted positive rules being brought into harmony with them, there is often some difficulty in knowing how far the writers who profess them would go. It is commonly stated that the sea can not be occupied; it is indivisible, inexhaustible, and productive, in so far as it is productive at all, irrespectively of the labor of man; it is neither physically susceptible of allotment and appropriation; nor is there the reason for its appropriation which induced men to abandon the original community of goods.³ If these objections to proprietary rights over the sea are sound they apply as much to one portion of it as to another. It might be expected therefore that the right of maritime occupation would be wholly denied. But it is not so. Enclosed seas, straits, and littoral seas were regarded as susceptible of occupation. The right of Sweden to the Gulf of Bothnia, of the Turks to the Archipelago, of England to St. George's Channel, of Holland to the Zuyder Zee, and of Denmark to both the Belts and to the Sound.

¹ De Martens, *Nouv. Rec.* v. ii. 358, and vi. 684: *Behring Sea Arbitration, British Case*, p. 48. So late as 1875 Russia seems to have made a claim elsewhere to property in some considerable extent of water, for in that year Mr. Fish, the American Secretary of State, wrote, "There was reason to hope that the practice which formerly prevailed with powerful nations of regarding seas and bays usually of large extent near their coast as closed to any foreign commerce or fishery not specially licensed by them, was, without exception, a pretension of the past, and that no nation would claim exemption from the general rule of public law which limits maritime jurisdiction to a marine league from its coasts. We should particularly regret if Russia should insist on any such pretension." Wharton's *Digest*, i. 106.

² The award was published on the 15th of August, 1893. The full text is printed in *The Times* of the following day, and is also contained in de Martens, *Nouveau Recueil Général*, 2ème sér. xxi. 439.

³ Wolff, *Jus Gentium*, § 127, &c.; Vattel, liv. i. ch. xxiii. § 281; De Martens, *Précis*, § 43. Bynkershoek (1673-1743), *De Domino Maris*, c. ii, Lampredi (*Jur. Pub. Univ. Theorem*, p. ii. cap. §§ 8, 9), Azuni (1766-1827), *Droit Maritime de l'Europe*, pt. i. ch. ii. art. I, all affirm the principle that the sea can be occupied in so far as it is used and guarded.

was, it seems, 'uncontested';¹ and a margin varying in width from gunshot or a marine league from the shore to a space bounded by the horizon, or even according to one authority, by a line a hundred miles from the coast, was universally conceded.² The parts of the sea which are thus excepted are large, so large indeed that they bring down the doctrines of jurists to very nearly the same results as are given by usage. It is evident that the minds of writers were still influenced by the traditional view that occupation is permitted in principle. Their word-play about the fluidity of water was really only intended to limit appropriation of the sea to those parts of it which could in fact be kept under the control of a state. It was admitted, even by those who most uncompromisingly assert the sea to be insusceptible of appropriation, that such parts of it as may be necessary to the safety of a state may be controlled. No one in truth was prepared unqualifiedly to abandon the view that the sea may be subjected to proprietary rights; still less was anyone prepared definitely to accept the opposite doctrine with all its consequences. It was universally felt that states cannot maintain effective occupation at a distance from their shores, and that free commercial navigation had become necessary to the modern world. There was therefore a general willingness to declare the ocean to be free, and to consider States as holding waters, which might fairly be looked upon as territorial, subject to a right of navigation on the part of other States. But acceptance of the freedom of the open seas merely marked a stage in a gradual settlement of the conditions under which occupation, when applied to the sea, may be held to be valid; and recognition of the right of passage only saddled private property with a kind of servitude for the general good.

Down to the beginning of the nineteenth century then, the course of opinion and practice with respect to the sea had been as follows. Originally it was taken for granted that the sea could be appropriated. It was effectively appropriated in some instances; and in others extravagant pretensions were put forward, supported by wholly insufficient acts. Gradually, as appropriation of the larger areas was found to be generally unreal, to be burdensome to strangers, and to be unattended by compensating advantages, a disinclination to submit to it arose, and partly through insensible abandonment,

¹ De Martens, *Précis*, § 42.

² Bynkershoek (*De Dominio Maris*, c. 11), Vallin (*Commentaire sur l'Ordonnance de la Marine*, li. 688), Vattel (liv. 1. ch. xxii. § 289), Moser (*Versuch des neuesten Europäischen Völkerrechts*, v. 486), Lampredi (*Jur. Pub. Univ. Theorem*, p. iii. cap. 11, § 8), De Martens (*Précis*, § 153), and Lord Stowell in *The Ticec Gebroeders*, 3 C. Rob. 339, considered that the range of a cannon-shot, which was supposed to be a marine league, measured the breadth of territorial waters along the open coast. Rayneval thought the horizon was the boundary. Casaregis (*De Commercio Disc.* 136, 1) pronounced for a hundred miles. Gallani, according to Azuni, and Azuni himself regarded the extent of permissible marginal appropriation to be an open question, which should be settled by treaties in each particular case. Azuni, *Droit Maritime de l'Europe*, pt. 1. ch. 11. art. 11. § 14.

partly through opposition to the exercise of inadequate or intermittent control, the larger claims disappeared, and those only continued at last to be recognized which affected waters the possession of which was supposed to be necessary to the safety of a State, or which were thought to be within its power to command. Upon this modification of practice it may be doubted whether theories affirming that the sea is insusceptible of occupation had any serious influence. They no doubt accelerated the restrictive movement which took place, but outside the realm of books they never succeeded in establishing predominant authority. The true key to the development of the law is to be sought in the principle that maritime occupation must be effective in order to be valid. This principle may be taken as the formal expression of the results of the experience of the last two hundred and fifty years, and when coupled with the rule that the proprietor of territorial waters may not deny their navigation to foreigners, it reconciles the interests of a particular State with those of the body of States. As a matter of history, in proportion as the due limits of these conflicting interests were ascertained, the practical rule which represented the principle became insensibly consolidated, until at the beginning of the present century it may fairly be said that though its application was still rough it was definitely settled as law.

§ 41. It remains to see whether the rule is now applied more precisely, or, in the absence of sufficient precision, what would be a reasonable application of it.

Of the marginal seas, straits, and enclosed waters which were regarded at the beginning of the nineteenth century as being susceptible of appropriation, the case of the first is the simplest. In claiming its marginal seas as property a State is able to satisfy the condition of valid appropriation, because a narrow belt of water along a coast can be effectively commanded from the coast itself either by guns or by means of a coast guard. In fact also such a belt is always appropriated, because States reserve to their own subjects the enjoyment of its fisheries, or, in other words, take from it the natural products which it is capable of yielding. It may be added that, unless the right to exercise control were admitted, no sufficient security would exist for the lives and property of the subjects of the State upon land; they would be exposed without recognized means of redress to the intended or accidental effects of acts of violence directed against themselves or others by persons of whose nationality, in the absence of a right to pursue and capture, it would often be impossible to get proof, and whose State consequently could not be made responsible for their deeds. Accordingly, on the assumption that any part of the sea is susceptible of appropriation, no serious question can arise as

to the existence of property in marginal waters.¹ Their precise extent, however, is not so certain. Generally their limit is fixed at a marine league from the shore; but this distance was defined by the supposed range of a gun of position, and the effect of the recent increase in the power of artillery has not yet been taken into consideration, either as supplying a new measure of the space over which control may be efficiently exercised, or as enlarging that within which acts of violence may be dangerous to persons and property on shore. It may be doubted, in view of the very diverse opinions which have been held until lately as to the extent to which marginal seas may be appropriated, of the lateness of the time at which much more extensive claims have been fully abandoned, and of the absence of cases in which the breadth of territorial water has come into international question, whether the 3-mile limit has ever been unequivocally settled; but in any case, as it has been determined, if determined at all, upon an assumption which has ceased to hold good, it would be pedantry to adhere to the rule in its present form; and perhaps it may be said without impropriety

¹ In addition to the earlier writers previously quoted with reference to marginal waters, see Klüber, §§ 128-130; Wheaton, *Elem.*, pt. ii. ch. iv, §§ 6 and 10, Halleck, i. 167; Phillimore, i. §§ cxvi-cxvii; Bluntschli, § 302; Flore, § 787. [Oppenheim, i. §§ 186, 189; Westlake, *Peace*, 188-190; Bonfils-Fauchille, § 491; Despagnet, § 404; J. B. Moore Digest, i. § 144; T. W. Fulton, *Sovereignty of the Sea* (1911), 576-603. A. Raestad, *La mer territoriale* (1913).]

Some modern writers deny that States can have property in any part of the sea, but admit the existence either of sovereignty and jurisdiction, or of some measure of the latter only. Heffter (§ 74) supposes that "la police et la surveillance de certains districts maritimes, dans un intérêt de commerce et navigation, ont été confiées à l'état le plus voisin," and that "l'intérêt de la sûreté peut en outre conférer à un état certains droits sur un district maritime." Ortolan (*Dip. de la Mer*, liv. ii. ch. 7 and 8), repeating the old arguments in favor of the view that the sea is insusceptible of appropriation, says, "ainsi, le droit qui existe sur la mer territoriale n'est pas un droit de propriété: on ne peut pas dire que l'état propriétaire des côtes soit propriétaire de cette mer. . . . En un mot, l'état a sur cet espace non la propriété, mais un droit d'empire: un pouvoir de législation, de surveillance et de juridiction." Calvo (§ 244) alleges that "pour résoudre le question (of the extent of territorial waters) d'une manière à la fois rationnelle et pratique, il faut d'abord, ce nous semble, ne pas perdre de vue que les états n'ont pas sur la mer territoriale un droit de propriété, mais seulement un droit de surveillance et de juridiction dans l'intérêt de leur défense propre ou de la protection de leurs intérêts fiscaux." Twiss (i. § 173) seems implicitly to adopt the same doctrine by saying that as "the term territory in its proper sense is used to denote a district within which a nation has an absolute and exclusive right to set law, some risk of confusion may ensue if we speak of any part of the open sea over which a nation has only a concurrent right to set law, as its maritime territory."

If a correct impression is given by the historical sketch in the text, it is obvious that the doctrine of these writers is erroneous. It is besides open to the objections that—

1. It does not account for the fact that a State has admittedly an exclusive right to the enjoyment of the fisheries in its marginal waters.

2. As the rights of sovereignty or jurisdiction belonging to a State are in all other cases except that of piracy, which in every way stands wholly apart, indissolubly connected with the possession of international property, a solitary instance of their existence independently of such property requires to be proved, like all other exceptions to a general rule, by reference to a distinct usage, which in this case can not be shown.

Sir Travers Twiss appears to be unduly affected by the existence of certain immunities from local jurisdiction which there is no difficulty in regarding as exceptional.

Grotius (*De Jure Belli ac Pacis*, lib. ii. c. iii, § 13) is the source of the doctrine.

that a State has theoretically the right to extend its territorial waters from time to time at its will with the increased range of guns. Whether it would in practice be judicious to do so; whether it would be politic for a country, which wished to avoid dangerous friction between itself and other nations, to act in this direction without having secured the concurrence of the more important maritime States, either by the negotiation of separate treaties, or through the acceptance of the principle in a conference of the powers, is a widely different matter, and one which is outside the purview of law. In any case the custom of regarding a line 3 miles from land as defining the boundary of marginal territorial waters is so far fixed that a State must be supposed to accept it in the absence of express notice that a larger extent is claimed.¹

It seems to be generally thought that straits are subject to the same rule as the open sea; so that when they are more than 6 miles wide the space in the center which lies outside the limit of a marine league is free, and that when they are less than 6 miles wide they are wholly within the territory of the State or States to which their shores be-

¹ The question of the principle upon which the extent of marginal waters should be founded, and of the breadth of water that should be included, has of late attracted a considerable amount of attention. It is felt, and growingly felt, not only that the width of three miles is insufficient for the safety of the territory, but that it is desirable for a State to have control over a larger space of water for the purpose of regulating and preserving the fisheries in it, the productiveness of sea fisheries being seriously threatened by the destructive methods of fishing which are commonly employed, and in many places by the greatly increased number of fishing vessels frequenting the grounds.

After being carefully studied and reported upon by a committee of the *Institut de Droit International*, the subject was exhaustively discussed by the *Institut* at its meeting in Paris, in 1894, the exceptionally large number of thirty-nine members being present. With regard to the necessity of ascribing a greater breadth than three miles of territorial water to the littoral State there was no difference of opinion. As to the extent to which the marginal belt should be enlarged, and the principle upon which enlargement should be based, the same unanimity was not manifested; but ultimately it was resolved by a large majority that a zone of six marine miles from low-water mark ought to be considered territorial for all purposes, and that in time of war a neutral State should have the right to extend this zone, by declaration of neutrality or by notification, for all purposes of neutrality, to a distance from the shore corresponding to the extreme range of cannon.

The decision of the Behring Sea Arbitral Tribunal does not constitute an addition to authority upon the question of the due extent of territorial waters. The award recognized the 'ordinary three-mile limit' as that outside of which the United States had no right of protection or property in the fur seals frequenting the Behring Sea. But M. de Courcel has since explained that the tribunal 's'est borné à constater que les parties étaient d'accord pour admettre que l'étendue de trois milles à partir de la côte comme formant, dans l'espèce qui lui était soumise, la limite ordinaire des eaux territoriales' (M. de Courcel to M. Aubert, ap. *Ann. de l'Inst. de Droit Int.*, for 1894, p. 282). The tribunal therefore not only refused to legislate, to do which would of course have been beyond its province; it also refused to affirm that it found the three-mile limit to be, as a matter of fact, universally accepted. So far as it is concerned, the question of authoritative custom remains open. [See Fulton, *Sovereignty of the Sea*, 650-92 for summary of modern views; also T. Barclay, *Problems of International Law and Diplomacy*, 109-112.]

[The subsoil underlying the bed of the open sea may, it is thought, be appropriated by the adjacent State, as by tunneling (Oppenheim, *Z. für Völkerrecht* (1908), i. 1-16, and *Int. Law*, i. §§ 287 (c) (d)). The mode of acquisition may be by occupation of a *res nullius* (Oppenheim, op. cit., F. von Liszt, *Das Völkerrecht*, § 26 (b)) or accession (Robin, *R. G. D. J.* (1908), xv. 50-77 at p. 69.)]

long. This doctrine however is scarcely consistent with the view, which is also generally taken, that gulfs, of a greater or less size in the opinion of different writers, when running into the territory of a single State, can be included within its territorial waters; perhaps also it is not in harmony with the actual practice with respect to waters of the latter kind. France perhaps claims *baies fermées* and other inlets or recesses the entrance of which is not more than 10 miles wide.¹ Germany regards as territorial the waters within bays or incurvations of the coast which are less than 10 sea miles in breadth reckoned from the extremest points of the land, and doubtless includes all the water within 3 miles outward from the line joining such headlands. England would, no doubt, not attempt any longer to assert a right of property over the King's Chambers, which include the waters within lines drawn from headland to headland, as from Orfordness to the Foreland and from Beachy Head to Dun-nose Point; but some writers seem to admit that they belong to her, and a modern decision of the Privy Council has affirmed her jurisdiction over the Bay of Conception in Newfoundland, which penetrates 40 miles into the land and is 15 miles in mean breadth. Authors also so little favorable to maritime property as Ortolan and De Cussy, class the Zuyder Zee amongst appropriated waters. The United States probably regard as territorial the Chesapeake and Delaware Bays and other inlets of the same kind.² Many claims to gulfs and bays still find their place in the books, but there is nothing to show what proportion of these are more than nominally alive. In principle it is difficult to separate gulfs and straits from one another;

¹ The latter at least was the general reservation made by the Fishery Treaty of 1839 with England (De Martens, *Nouv. Rec.* xvi. 954), but the convention did not profess to be an expression of the law on the subject. The whole of the oyster beds in the Bay of Cancale, the entrance of which is 17 miles wide, were regarded as French, and the enjoyment of them is reserved to the local fishermen, but, again, the cultivation of the beds by the local French fishermen renders the case exceptional.

² Klüber, § 130; De Martens, *Précis.* § 42; Wheaton, *Elem.* pt. II. ch. IV. §§ 7, 9; Heffter, § 76; Ortolan, *Dip. de la Mer*, liv. II. ch. VIII; Phillimore, I. §§ cxxxviii, cxcix; Halleck, I. 176; Bluntschli, § 309; *Direct United States Cable Company Limited v. Anglo-American Telegraph Company Limited* (1877), L. R. 2 A. C. 394. It was apparently decided in 1859 by the Queen's Bench in *Reg. v. Cunningham*, Bell's Crown Cases, 86, that the whole of the Bristol Channel between Somerset and Glamorgan is British territory; possibly, however, the Court intended to refer only to that portion of the channel which lies within Steepholm and Flatholm. [In *Mortensen v. Peters* (1906), 5 Justiciary Reports, 121, *American Journal of International Law* (1907) I. 526, it was held that an alien could be convicted of fishing in a manner contrary to 52 & 53 Vic., c. 23, sec. 6, which prohibits beam and other trawling within specified areas, one of which is the Moray Firth; and that it was no defense that the act had been committed beyond the 3-mile limit though within the limits of the Moray Firth. On diplomatic representations being made to the Foreign Office, the fine was remitted. The Trawling in Prohibited Areas Prevention Act, 1909 (9 Ed. VII, c. 8), to some extent meets the difficulty raised in the before-mentioned case. Oppenheim, I. § 192; cf. Westlake, *Peace*, 203.]

Whether the Government of the United States would or would not now claim Delaware Bay, it at least did so in 1793, when the English ship *Grange*, captured in it by a French vessel, was restored on the ground of the territoriality of its waters. *Am. State Papers*, I. 73. [J. R. Moore, *Digest*, I. § 158.]

the reason which is given for conceding a larger right of appropriation in the case of the former than of the latter, *viz*, that all nations are interested in the freedom of straits, being meaningless unless it be granted that a State can prohibit the innocent navigation of such of its territorial waters as vessels may pass over in going from one foreign place to another. If that could be done, it might be necessary to impose a special restriction upon the appropriation of waters which by their position are likely to be used. Such however not being the case in fact, it is the power of control and the safety of the State which have alone to be looked to.

The power of exercising control is not less when water of a given breadth is terminated at both ends by water than when it merely runs into the land, and the safety of the State may be more deeply involved in the maintenance of property and of consequent jurisdiction in the case of straits than in that of gulfs. Of practice there is a curious deficiency; but there is one recent case from which it would appear that both Great Britain and the United States continue to claim as territorial the waters of a strait, which is much more than 6 miles in width. By the treaty of Washington of 1846 it was stipulated that the boundary between the United States and British North America should follow the forty-ninth parallel of latitude to the middle of the strait separating Vancouver's Island from the continent, and from there should run down the middle of the Strait of Fuca to the Pacific. Disputes involving the title to various islands having arisen, the boundary question at issue between the two nations was submitted to the arbitration of the German Emperor, and in 1873 a protocol was signed at Washington for the purpose of marking out the frontier in accordance with his arbitral decision. Under this protocol, the boundary, after passing the islands which had given rise to dispute, is carried across a space of water 35 miles long by 20 miles broad, and is then continued for 50 miles down the middle of a strait 15 miles broad, until it touches the Pacific Ocean midway between Bonilla Point on Vancouver's Island and Tatooch Island lighthouse on the American shore, the waterway being there 10½ miles in width.¹

[In the North Atlantic Coast Fisheries Arbitration 1910, the Hague tribunal rejected the argument of the United States that the alleged 3-mile limit was, as a rule of international law, applicable to bays, and that a bay ceased to be territorial if it exceeded six miles *inter fauces terrae*. The tribunal's reasons material to the present purpose were: (1) The geographical character of a bay contains conditions which concern the interests of the territorial sovereign to a more intimate and important extent than do those connected with

¹ *Parl. Papers, North Am.*, No. 10, 1873.

the open coast, e. g. conditions of national and territorial integrity, defense, commerce, industry; (2) the opinion of jurists and publicists show that, speaking generally, the 3-mile limit should not be strictly and systematically applied to bays. The tribunal decided, 'in case of bays the 3 marine miles are to be measured from a straight line drawn across the body of water at the place where it ceases to have the configuration and characteristics of a bay. At all other places the 3 marine miles are to be measured following the sinuosities of the coast.' But having regard to the fact that Great Britain had adopted in several treaties the rule that only bays 10 miles in width should be considered as those reserved for fishing by nationals, the tribunal, while recognizing that these circumstances were insufficient to constitute this a principle of international law, recommended for the acceptance of the disputants the rule that in every bay which was the subject-matter of the case, and for which the award made no specific provision, the limits of exclusion should be drawn 3 miles seaward from a straight line across the bay in the part nearest the entrance at the first point where the width does not exceed 10 miles.]¹

On the whole question it is scarcely possible to say anything more definite than that, while on the one hand it may be doubted whether any State would now seriously assert a right of property over broad straits or gulfs of considerable size and wide entrance, there is on the other hand nothing in the conditions of valid maritime occupation to prevent the establishment of a claim either to basins of considerable area, if approached by narrow entrances such as those of the Zuyder Zee, or to large gulfs which, in proportion to the width of their mouth, run deeply into the land, even when so large as Delaware Bay, or still more to small bays, such as that of Cancale. If the width of marginal seas were extended to 6 miles, to the extreme range of cannon, or to any other specific limit, there could of course be no question as to the territorial character of straits or gulfs not more than double the breadth of the marginal limit.²

§ 42. In all cases in which territorial waters are so placed that passage over them is either necessary or convenient for the navigation of open seas, as in that of marginal waters, or of an appropriated strait connecting unappropriated waters, they are subject to a right of innocent use by all mankind for the purposes of commercial navigation.³ The general consent of nations, which was seen to be wanting to the alleged right of navigation of rivers, may fairly be said

[¹ Martens. *N. R. G.*, 3rd ser. iv, 89-129; *American Journal of International Law* (1910) iv. 948-1000.]

² An interesting discussion bearing upon the subject of the above section took place in the course of the arguments before the Behring Sea Tribunal of Arbitration. Report of the Proceedings, pp. 1284-91.

³ The case of gulfs or other inlets would seem to be upon a different footing, except in so far as they are used for purposes of refuge. Any right to their navigation must be founded on a right of access to the state itself.

to have been given to that of the sea. Even the earlier and more uncompromising advocates of the right of appropriation reserved a general right of innocent navigation; for more than 250 years no European territorial marine waters which could be used as a thoroughfare, or into which vessels could accidentally stray or be driven, have been closed to commercial navigation; and since the beginning of the nineteenth century no such waters have been closed in any part of the civilized world. The right therefore must be considered to be established in the most complete manner.¹

This right of innocent passage does not extend to vessels of war. Its possession by them could not be explained upon the grounds by which commercial passage is justified. The interests of the whole world are concerned in the possession of the utmost liberty of navigation for the purposes of trade by the vessels of all States. But no general interests are necessarily or commonly involved in the possession by a State of a right to navigate the waters of other States with its ships of war. Such a privilege is to the advantage only of the individual State; it may often be injurious to third States; and it may sometimes be dangerous to the proprietor of the waters used. A State has therefore always the right to refuse access to its territorial waters to the armed vessels of other States, if it wishes to do so.²

[There are differences of opinion in regard to the right of innocent passage of warships through the territorial waters of a State, and discussions which occurred at the Hague Conference in 1907 on the subject of mines and the rights and duties of neutral powers in maritime war, showed that there was no unanimity among States on this important subject.³ There are two cases to be distinguished, (a) passage through a territorial strait connecting two portions of the high seas. (b) passage through the territorial waters of a State not forming part of a strait. Westlake dissents from the foregoing statement of Mr. Hall chiefly on the grounds that the territorial sovereign could well protect itself from abuse, as is recognized by Article 5 of the Resolutions of the Institute of International Law,⁴ and that an unlimited power of exclusion would subject a belligerent

¹ Klüber (§ 76) is probably the only writer who denies the existence of the right. He says, 'on ne pourrait accuser un Etat d'injustice s'il défendait . . . le passage des vaisseaux sur mer sous le canon de ses côtes.'

² States may and do make special regulations for the entrance and sojourn of foreign ships of war within their territorial waters, ports, and harbors. Such ships are required to conform to the general police, sanitary, fiscal and harbor regulations, including pilotage (see U. S. Naval War College: *International Law Situations*, 1907, 23-45). Belgium, in 1901, issued special regulations as to the admission of foreign men-of-war into her ports, and forbade their entry into the Belgian waters of the Scheldt without previous permission of the Foreign Minister. Germany, Italy, Austria, France and Holland have made regulations for the entry of foreign warships into their fortified harbors. See *R. G. D. I.* 21. 20 (Documents). F. Perels, *Das internationale Seerecht*, §14, II. note.

³ H. P. C., 340, 467.

⁴ *Post*, p. 148.

warship to intolerable interruption.¹ Oppenheim says it may be safely stated that the right of foreign States for their men-of-war to pass unhindered through the maritime belt is not generally recognized, and that States have a right to exclude them, though in practice this is not done, while as regards straits, it is a customary rule of international law that the right of passage through such parts of the territorial waters as form part of the highway for international traffic cannot be denied to foreign men-of-war.² Despagnet in effect adopts the resolutions of the Institute of International Law on both points,³ as also does J. B. Moore.⁴ Bonfils-Fauchille allows the territorial State to forbid passage through its territorial straits, 'sauf le respect des convenances internationales,'⁵ but adds that passage through its territorial waters can only be forbidden in time of war and if the territorial Power is belligerent.⁶

The Bosphorus and Dardanelles which are Turkish territorial straits connecting the Black Sea and the Mediterranean, owing to historical reasons, stand on a peculiar footing. Until the conquest of the Crimea by Russia in 1774 the Black Sea was in effect a Turkish lake, but after this date the Porte by various treaties allowed foreign merchant ships to pass through the straits. The Treaty of the Dardanelles of 1809, between Great Britain and Turkey, recognized that it was the 'ancient rule of the Ottoman Empire' that foreign warships should be excluded. In the Treaties of London 1841 and Paris 1856 the Powers recognized the existence of the rule, but the Treaty of Paris allowed the passage of light cruisers in the service of the embassies at Constantinople and of small warships for the protection of international works at the Danube mouth, and the waters and ports of the sea were thrown open to the mercantile marine of every nation, but warships were excluded (Art. 11). The Treaty of London 1871, gave a 'power to His Imperial Majesty the Sultan to open the said straits in time of peace to the vessels of war of friendly and allied Powers, in case the Sublime Porte should judge it necessary in order to secure the execution of the stipulations of the Treaty of Paris of 30 March, 1856.' The passage through the Dardanelles in 1904 of the Russian volunteer cruisers *Smolensk* and *Petersburg* under the merchant flag, and their subsequent conversion into cruisers on the high seas raised a serious dispute between Great Britain and Russia as to a violation of the Treaties regulating the passage of the straits. The closing of the Dardanelles by the Porte to commercial traffic for a short time in April, 1912, during the war be-

¹ *Peace*, 196.

² §§ 188, 195, 449.

³ §§ 403, 417.

⁴ *Digest*, §§ 134, 144.

⁵ §§ 517-8.

⁶ § 507.

tween Turkey and Italy, again raised serious questions; the loss to neutral shipping was estimated at £3,000 a day. It is not quite clear whether the merchant vessels of States other than Russia have a right by treaty to the free passage of the Dardanelles and entrance and exit to the Black Sea, though Article 24 of the Treaty of San Stefano provides that the Bosphorus and Dardanelles shall remain open in time of war as in time of peace to the merchant vessels of neutral States arriving from or bound to Russian ports. In the course of a debate in the House of Lords on May 3, 1912, while the closing of the Straits by Turkey as an act of self-preservation was recognized, Lord Lansdowne pointed out that 'the real question, which will have to be considered sooner or later, is the extent to which a belligerent Power, controlling narrow waters which form a great trade avenue for the commerce of the world, is justified in entirely closing such an avenue, in order to facilitate the hostile operations in which the Power finds itself involved.' Such a settlement must needs follow the present international conditions.¹

It is usual in works on international law to enumerate a list of servitudes to which the territory of a State may be subjected. Amongst them are the reception of foreign garrisons in fortresses, fishery rights in territorial waters, telegraphic and railway privileges, the use of a port by a foreign power as a coaling station, an obligation not to maintain fortifications in particular places, and other derogations of like kind from the full enforcement of sovereignty over parts of the national territory. These and such-like privileges or disabilities must however be set up by treaty or equivalent agreement; they are the creatures not of law but of compact. The only servitudes which have a general or particular customary basis are, the above-mentioned right of innocent use of territorial seas, customary rights over forests, pastures, and waters for the benefit of persons living near a frontier, which seem to exist in some places, and possibly a right to military passage through a foreign State to outlying territory.² In their legal aspects there is only one

¹ See Holland, *The European Concert in the Eastern Question*, 225; *Letters on War and Neutrality* (2nd. ed.), 50-4; Westlake, *Peace*, 197-200; Oppenheim, i. § 197; Perels, § 5, p. 39; T. Baty, in *Jahrbuch des Völkerrechts* (1913) i. 681-9; *American Journal of International Law* (1912) vi. 706-9.

² It is extremely doubtful whether any instances of a right to military passage have survived the simplification of the map of Central Europe. [The treatment of the right of innocent passage as an international servitude is criticised by Oppenheim, i. § 203. See also Pitt Cobbett, *Leading Cases: Peace*, 111. The theory of state servitudes was rejected by the Arbitrators in the *North Atlantic Coast Fisheries Case* on the grounds that a servitude in international law predicated an express grant of a sovereign right, that the theory originated under the peculiar and more obsolete conditions prevailing in the Holy Roman Empire and was unsuitable to modern conditions. (For criticism of these arguments see Oppenheim, *op. cit.*, and authorities there cited.) A case decided by the Supreme Court of Cologne on April 21, 1914, in which the Dutch Government sued the Aix-la-Chapelle-Maastricht Railway Co., recognized the existence of an international servitude. *American Journal of International Law* viii (1914) 858-860.]

point upon which international servitudes call for notice. They conform to the universal rule applicable to 'jura in re aliena.' Whether they be customary or contractual in their origin, they must be construed strictly. If therefore a dispute occurs between a territorial sovereign and a foreign power as to the extent or nature of rights enjoyed by the latter within the territory of the former, the presumption is against the foreign State, and upon it the burden lies of proving its claim beyond doubt or question.

Page 204.—§ 55. From what has been said it is clear that there is now a great preponderance of authority in favor of the view that a vessel of war in foreign waters is to be regarded as not subject to the territorial jurisdiction. This being the case the law may probably be stated as follows:

A vessel of war, or other public vessel of the State, when in foreign waters is exempt from the territorial jurisdiction; but her crew and other persons on board of her cannot ignore the laws of the country in which she is lying, as if she constituted a territorial enclave. On the contrary, those laws must as a general rule be respected. Exceptions to this obligation exist, in the case of acts beginning and ending on board the ship and taking no effect externally to her, firstly in all matters in which the economy of the ship or the relations of persons on board to each other are exclusively touched,¹ and secondly to the extent that any special custom derogating from the territorial law may have been established,—perhaps also in so far as the territorial law is contrary to what may be called the public policy of the civilized world. In the case of acts done on board the vessel, which take effect externally to her, the range of exception is narrower. The territorial law, including administrative rules, such as quarantine regulations and rules of the port, must be respected, to the exception, it is probable, of instances only in which there is a special custom to the contrary. When persons on board a vessel protected by the immunity under consideration fail to respect the territorial law within proper limits the aggrieved State must as a rule apply for redress to the government of the country to which the vessel belongs,—all ordinary remedies for, or restraints upon, the commission by persons so protected of wrongful acts affecting the territory of a State being forbidden. In extreme cases, however, as where the peace of a country is seriously threatened or its sovereignty is infringed, measures may be taken against the ship itself, analogous to those which in like circumstances may be taken

¹ The case which, however, would be extremely rare on board a ship of war, of a crime committed by a subject of the State within which the vessel is lying against a fellow subject, would no doubt be an exception to this. It would be the duty of the captain to surrender the criminal.

against a sovereign; it may be summarily ordered out of the territory, and it may if necessary be forcibly expelled.

Page 790.—All neutral mercantile vessels are subject to visit upon the high seas, and within the territorial waters of the belligerent or his enemy.

HALLECK: *International Law. Fourth edition. London, 1908.*

Volume 1, page 134, § 18.—Questions of territorial jurisdiction, or dominion over the narrow seas, have not unfrequently given rise to contentions with respect to the maritime honors to be rendered to the flag of the State claiming such dominion, by the vessels of others who denied its pretensions to such supremacy. This kind of supremacy was claimed by Great Britain over the narrow seas, by Denmark over the Sound and Belts at the entrance of the Baltic Sea,¹ and by Venice over the Adriatic Sea or Gulf of Venice; and serious international difficulties resulted in former times with respect to the formalities and maritime honors required by these States, and the neglect or refusal of others to observe or render them. But these peculiar formalities, formerly required by particular States, in particular places where their dominion was disputed, are now either entirely suppressed, or modified and regulated by treaty stipulations.²

¹ See ch. vi, § 19.

² Phillimore, *Int. Law*, vol. II, § 34; Schlegel, *Staats-Recht des K. D.*, Th. I. p. 412; Martens, *Nouveau Recueil*, t. VIII, p. 72; Ortolan, *Dép. de la Mer*, liv. II, ch. xv.; Chitty, *Commercial Law*, vol. II, p. 324; Heffter, *Droit International*, §§ 32, 197; De Cussy, *Droit Maritime*, liv. I, tit. II, § 61, liv. II, ch. xxix; Garden, *De la Diplomatie*, liv. III, § 2.

Examples of certain States having prescribed rules of navigation to other States may be found in ancient history. The City of Tyre claimed the adjoining seas; the Romans gave directions to the Carthaginians; the Athenians prohibited the Median ships of war from entering their seas, and also dictated to the Lacedaemonians.

The dominion was claimed by Great Britain over the *British Seas*, that is, not only over the Channel, but over the four seas; the extent of this jurisdiction is mentioned in a treaty made with the Dutch in 1653, and in a subsequent treaty, five years later, the dominion is defined to be from Cape Finsterre to the middle point of the land Van Staten, in Norway. From the case of the *Queen and Sir John Constable* (II. 29 Ellz. B. R., Leonard, part 3, 72), it appears that before the Union the British dominion on the sea was claimed, not only midway to, but as far as, the coasts of France, and that it extended midway to the coast of Spain.

In the third year of Henry V it was directed by proclamation of the king that no British subject, for one year from the date thereof, was to go to the insular ports of Denmark and Norway or to Iceland for the purpose of fishing or for any other cause to the prejudice of those realms, *otherwise than it had been accustomed of old*.

In the reign of Edward I. one, Reyner Grimbald, a French admiral, was ordered by a mixed tribunal of judges (chosen by the English and French kings for the purpose of administering justice *secundum legem mercatoriam et formam sufferantiae* to all merchants) to make satisfaction and suffer punishment because, during war between Philip, King of France, and Guy, Earl of Flanders, he had despoiled Flemish and English merchants of their goods on the English seas. These judges, together with the procurators of the Genoese, the Catalonians, the Spaniards, the Germans, the Zealanders, the Dutch, the Danes, the Norwegians, and most of the maritime nations of Europe, jointly declared

Page 167, § 13.—National territory consists of water as well as land. Maritime territory of every State extends to the ports, harbors, bays, mouths of rivers, and adjacent parts of the sea inclosed by headlands belonging to the same State. Within these limits its rights of property and territorial jurisdiction are absolute, and exclude those of every other State. Bynkershoek says: ‘Hinc videas priscos juris magistros, qui dominium in mare proximum ausi sunt agnoscere, in regundis ejus finibus admodum vagari incertos. . . . Quare omnino videtur rectius, eo potestatem terrae extendi, quousque tormenta exploduntur; eatenus quippe cum imperare, tum possidere videmur. Loquor autem de his temporibus, quibus illis machinis utimur; alioquin generaliter dicendum esset, potestatem terrae finiri ubi finitur armorum vis; etenim haec, ut diximus, possessionem tuetur.’ Following this principle the general usage of nations superadds to the maritime territory an exclusive territorial jurisdiction over the sea for the distance of one marine league, or the range of a cannon-shot (as above mentioned), along all the shores or coasts of the State. The maxim of law on

“that the kings of England, by right of the said kingdom from time to time, whereof there is no memorial to the contrary, have been in peaceful possession of the Sovereign Lordship of the seas of England and of the isles within the same, with power of making and establishing laws, statutes, and prohibitions of arms, and of ships otherwise furnished than merchantmen used to be, and of taking surety, and affording safeguard in all cases where need shall require, and of ordering all things necessary for the maintaining of peace, right, and equity among all manner of people, as well of other dominions as their own, passing through the said seas, and the sovereign guard thereof.” It is to be observed that Edward I. did not possess Normandy, and therefore the dominion of the British seas could not have been claimed by him as *dominus utriusque ripae*; this argues in favor of the British seas being annexed to the Kingdom of England by prescription.—*Rolles Abridgment*, 528; and see *Selden, De Dom. Maris*, 1, 2, c. 14, 27, 28; *Coke*, 4 *Inst.*, 142.

Again, it is enacted, by 5 Edward IV, cap. 6 (1465), that no foreigners may fish “in Irish countries,” i. e., off the coast of Ireland, without a license from the Lieutenant of Ireland, upon pain of forfeiture of the ships and goods to the king.

The dominion of the sea was held to confer on its possessor the sole right of fishing for pearl, coral, etc., all royal fish, and also the direction and disposal of all other fish. (*Palatius, De Dom. Mar.*, lib. i. c. ii; *Sir J. Constable's case*, *supra*.)

Such as were born on the four seas of England were accounted British subjects, and not aliens (*Selden, Mar. Claus.* lib. ii. c. 24; *Coke*, 4 *Inst.* fol. 142).

Queen Elizabeth, in 1600, stamped a *portouillis* on those dollars destined for the East Indian trade, to signify the right of closing navigation in her seas.

The Captain of the Gulf of Venice resided on the Isle of Corfu, and with ships of war and galleys protected the navigation and kept it free from pirates. In particular, no vessels of the Pope, of the King of Spain, or of the Sultan of Turkey, could enter the gulf without the license of the State. In 1638 a Turkish fleet was attacked by the Venetians, and many of their ships were sunk, for a disregard of this requirement. (See *Baptista Nani, Hist. of Venice*, lib. ii. fol. 446 et seq.). So jealous were the Venetians of permitting ships of any other State to navigate the gulf, which they deemed part of their domain, that in 1680 they refused to permit the Queen Mary, sister of the King of Spain, and married to the King of Hungary, to sail from Naples to Trieste in vessels of the Spanish navy, but required her to embark in Venetian galleys, declaring that, if she proceeded in any other way, the Republic would by force assert their proper rights to attack the Spanish navy as if they were enemies, and in a hostile manner invade them. The queen was subsequently carried in the Venetian vessels with great courtesy and ceremony. (*Palatius, De Dom. Mar.* ii. c. 6; also *Paucius, De Dom. Mar. Adriat.*)

this subject is¹ *terrae dominium finitur ubi finitur armorum vis*, which is usually recognized to be about 3 miles from the shore. And even beyond this limit States may exercise a qualified jurisdiction for fiscal and defensive purposes—that is, for the execution of their revenue laws and to prevent ‘hovering on their coasts.’² It is necessary to distinguish between *maritime territory* and *territorial jurisdiction*.

The question how far the law of a local State is applicable to a foreign vessel passing along or anchoring in its territorial waters has led to much divergence of opinion,³ but it may now be considered settled that a foreign vessel which does no more than pass along the coasts of a local State in that part of the sea which forms a portion of its territorial waters is subject, while so passing along, or temporarily anchoring, to the sovereignty of such local State, insomuch that in the absence of other legislation it is bound to respect the military and police regulations adopted by the State for the safety of its territory and of the population of the coast. The vessel in other re-

¹ The anonymous author of the poem “Della Natura,” lib. v., expresses this idea in the following lines:

“Tanto s’ avvanza in mar questo dominio.
Quant’ esser può d’ antemurale e guardia,
Fin dove può da terra in mar vibrandosi,
Correr di cavo bronzo accesso fulmine,”

Which may be thus translated:

“Far as the sovereign can defend his sway,
Extends his empire o’er the wat’ry way;
The shot sent thundering to the liquid plain
Assigns the limits of his just domain.”

² The British “Hovering Act” (9 Geo. II., c. 35) assumed a jurisdiction over four leagues from the coast for certain revenue purposes. All provisions in that act regarding hovering vessels were by the 47 Geo. III. sess. II. c. 66, extended to vessels within 100 leagues, if they fell within the description given by the latter act. These statutes were repealed, but some of their provisions, with a limitation, however, of 3 leagues, are reenacted in the Customs Act, 1876 (39 and 40 Vict., c. 36). For similar provisions in the United States, see *Laws, U. S.*, vol. iv, p. 320, §§ 25, 26, 27; and p. 437, § 99. Also *Church v. Hubbard*, 2 *Cranch*, 187.

³ The observations contained in the following references are worthy of comparison. Casaregis (*Disc. de Comm.*, § 136) says that the sovereign possessing the coast has equal sovereignty over the sea for 100 miles, with criminal jurisdiction, the power of tolls, and of prohibition to ships from passing.

Craig (*Jus Feud.* lib. i, § 18, p. 140) says: “Reges inter se quasi omnia maria dividerint : . . id mare censeatur quod alteri propinquius . . . in quo si delictum aliquod commissum fuerit, ejus sit jurisdictio qui proximum continentem possideat.”

Vattel (*Droit des Gens*, 288) says: “Powers extend their dominion over the sea as far as they can protect their right. It is of importance to the safety and welfare of the State that it should not be free to all the world to come so near to its possessions, especially with ships of war. . . . But then the nation can not refuse access to ships not suspected or making innocent use of its waters.”

Pascal Fiore (vol. i, p. 370) says: “Every nation has a *dominium utile* on the sea which washes its shores, in the interest of its preservation. It exercises besides a right of jurisdiction and police in the interest of its defense. . . . But publicists are not agreed as to the extent of the territorial sea, and the limit of the use (*domaine utile*) which the State may exercise.”

Hautefeuille says (*Des Droits des Neutres*, 197) that nations can “prohibit the vessels of other nations, or of any particular nation, from navigating territorial waters, or may

spects is as free as if it were on the high seas. But the local State has a right to legislate with respect to its territorial waters,¹ and in such case the vessel becomes subject while in the territorial waters to such local laws as may apply to it.²

By the 41 and 42 Vict. c. 73, passed by the British Parliament, August 16, 1878, an indictable offense committed by a person, whether he be or be not a subject of her Majesty, on the open sea, within such part of the sea adjacent to the coast of the United Kingdom, or to the coast of some other part of her Majesty's dominions as is deemed by international law to be within the territorial sovereignty of her Majesty, is an offense within the jurisdiction of the admiral, although it may have been committed on board or by means of a foreign ship; and the person who has committed such offense may be arrested, tried, and punished accordingly by British officials. 'Within the jurisdiction of the admiral' means, for the purposes of this Act, any part of the open sea within one marine league of the coast, measured from low-water mark. Proceedings cannot be taken under this Act without the consent of the Secretary of State or Governor of the colony. This statute was passed in consequence of the decision of a small majority of judges in the *Franconia*³ case in the Court of Crown Cases Reserved, that there was no jurisdiction in

prohibit the navigation for particular purposes. Foreigners entering this reserved territory must submit to the law of the sovereign in all that concerns their relations with the land and its inhabitants, as though they were on the land. The limit of the territorial sea is fixed by the principle from which its territorial character arises—as far as it can be commanded from the shore."

Ortolan says (*Diplom. de la Mer*, liv. II, c. 8) that as soon as there is sufficient depth for navigation, nations are entitled, as of right, to the use of the sea as a means of communication, but that the territorial sea may be made use of for the defence of a country, and a State may make laws ("lois de police et de sûreté") over the same. The State has over that space, not property, but a right of empire; a power of legislation, supervision, and jurisdiction, conformably to the rules of international jurisdiction.

See also the remarks of Sir W. Scott in the *Maria* (1 Rob., 352) and the *Twice Gebroeders* (3 *ibid.*, 162); also the *Leda* (*Swa. Aam.*, 40); the General Iron Screw Colliery Co. v. Schurmanns (*J. and H.* 180); the Free Fishers of Whitstable and Gann (11 C. B. N. S., 387, and 2 H. L. C., 192); Gammell v. Woods and Forests (3 Macq., 419); the *Ann* (1 Gall., 62); the *Exchange* (7 Cranch, 136); the *Admiralty* (12 Co. Rep., 79); and the 21 and 22 Vict., c. 109.

¹ Thus by virtue of the 13 and 14 Car. II, c. 28, Great Britain appears to have claimed and exercised until 1843 the right to enforce a close time for pilchard fishery by prohibiting them to be taken "in the high sea or in any bay, port, creek, or coast of, or belonging to, Cornwall or Devon . . . unless it be at the distance of one league and a half from the respective shores." This statute is repealed by the 31 and 32 Vict., c. 45. See also chs. vii, x, §§ 13, et seq.; Grotius, *De Jure Bel. ac Pac.* lib. II, c. III, § 10; Bynkershoek, *Quaest. de Jure Pub.* lib. I, c. viii; Bynkershoek, *De Domino Maris*, c. II; Polson, *Law of Nations*, § 5; Vattel, *Droit des Gens*, liv. I, ch. xxiii, § 289; Valin, *Com. sur l'Ord.*, liv. v, tit. 1; Azuni *Droit Maritime*, t. I, ch. II, art. III; Gardin, *De la Dip.*, t. I, p. 399; Hautefeuille *Droit des Nations Nouv.*, tit. I, ch. III, § I; Ortolan, *Diplomatie de la Mer*, liv. II ch. viii; De Cussy, *Droit Maritime*, liv. I, tit. II, § 40; Pistoye et Duverdy, *Traité des Prises*, tit. II, ch. I, § I; Heffter, *Droit International*, §§ 65, et seq.; Riquelme, *Derecho Púb. Int.* lib. I, tit. II, ch. III; Loccenius, *De Jure Maritimo*, lib. I, c. IV, § 6.

² *The Franconia*, R. v. Keyn, 2 L. R. Each Div., p. 63; Bluntschli *Int. Law*, § 322.

³ *Reg. v. Keyn*, 2 L. R. (Each Div.) 63.

England to try a foreigner who had committed manslaughter at sea within 3 miles of the British coast. The prisoner had been indicted at the Central Criminal Court for manslaughter. He was a foreigner, and in command of a foreign ship, passing within 3 miles of the shore of England, on a voyage to a foreign port; and while within that distance, his ship ran into an English ship and sank her, whereby a passenger on board the latter ship was drowned. The facts of the case were such as to amount to manslaughter by English law. It was held by the majority of the Court (Cockburn, C. J., Kelly, C. B., Bramwell, J. A., Lush and Field, J. J., Sir R. Phillimore and Pollock, B.), on the ground that prior to 28 Hen. VIII. c. 15 the admiral had no jurisdiction to try offenses by foreigners on board foreign ships, whether within or without the limit of 3 miles from the shore of England, and because the subsequent statutes only transferred to the common law courts the jurisdiction formerly possessed by the admiral, that therefore, in the absence of statutory enactment, the Central Criminal Court had no power to try the above offense. On the other hand, Lord Coleridge, C. J., Brett and Amphlett, J. J. A., Grove, Denman, and Lindley, J. J., held that the sea within 3 miles of the coast of England is part of the territory of England; that the English criminal law extends over those limits; and that the admiral formerly had and the Central Criminal Court now has, jurisdiction to try offenses there committed, although on board foreign ships. Lord Chief Justice Cockburn, in the course of a very exhaustive summing-up, representing the opinion of the majority of the Court, thus epitomized the contention for the prosecution:

Although the occurrence on which the charge is founded took place on the high seas in this sense, that the place in which it happened was not within the body of a county, it occurred within 3 miles of the English coast; by the law of nations the sea, for a space of 3 miles from the coast, is part of the territory of the country to which the coast belongs; and consequently the *Franconia*, at the time the offense was committed, was in English waters, and those on board were therefore subject to English law.

He then observes:

From the earliest period of English legal history, the cognizance of offenses committed on the high seas had been left to the jurisdiction of the admiral. Every offense was triable only in the county in which it had been committed. If an offense was committed in a bay or gulf, *inter fauces terrae*, the common law could deal with it, because the parts of the sea so circumstanced were held to be within the body of the adjacent county or counties; but along the coast, on the external sea, the jurisdiction of the common law extended no farther than to low-water mark. The office of coroner could

not be executed by the coroner of a county in respect of matters arising on the sea. An inquest could not be held by one of these officers on a body found on the sea. Such jurisdiction could only be exercised by a coroner appointed by the admiral. A similar difficulty existed as to wrongs done on the sea, and in respect of which the party wronged was entitled to redress by civil action till the anomalous device of a fictitious venue within the jurisdiction of the common-law courts, and which those courts did not allow to be disputed, was resorted to, and so the power of trying such actions was assumed. . . . 15 Ric. II, c. 3, gave the admiral concurrent jurisdiction with the common law, in respect of "the death of a man and of a mayhem done in great ships being and hovering in the main stream of the great rivers, only beneath the points of the same rivers, and in no other place of the same rivers." . . . On the shore of the outer sea, the body of the county extends so far as the land is uncovered by water, and between high and low water mark the jurisdiction has been divided between the Admiralty and the common law, according to the state of the tide. . . . We must therefore deal with this case as one which would have been under the ancient jurisdiction of the admiral. But the jurisdiction of the admiral, though largely asserted in theory, was never, so far as I am aware—except in the case of piracy, which, as the pirate was considered the *communis hostis* of mankind, was triable anywhere—exercised or attempted to be exercised in respect of offenses over other than English ships. No instance of any such exercise or attempted exercise, after every possible search has been made, has been brought to our notice. Though, by 25 Hen. VIII, c. 15, the trial of offenses previously within the jurisdiction of the admiral, was transferred to commissioners, I think that all that was effected by this statute or by those who have succeeded, as regards jurisdiction, was a transfer of the criminal jurisdiction of the admiral, such as it was, to courts proceeding according to the ordinary procedure of the common law. The 4 and 5 Wm. IV. c. 36, which gives power to the Central Criminal Court to try "offenses committed on the high seas and other places within the jurisdiction of the Admiralty of England," has obviously carried the matter no further. If the admiral had not jurisdiction as to offenses committed on foreign ships, the commissioners must be equally without it.

He then cites *Reg. v. Serva and others*¹ and *Reg. v. Lewis*² in support of the want of jurisdiction. The former case occurred off the coast of Africa, and decides that an English court of justice has no authority to try a foreigner, accused of having committed an offense on a foreign vessel, not within British waters. In the latter case, a foreign sailor was wounded on the high seas, but died at Liverpool of the injury. A conviction was sought under the provisions of 9

¹ 1 Den. Crim. Cas., 104.

² 1 Dears. and B. Crim. Cas., 182.

Geo. IV, c. 31, § 8, but it was held that the statute did not apply to foreigners for acts committed out of British territory. He also cites American cases, Palmer's case;¹ the U. S. v. Howard;² the U. S. v. Klintock;³ the U. S. v. Kessler;⁴ the U. S. v. Holmes.⁵ He then proceeds to observe that 'the jurisdiction of the admiral, however largely asserted in theory in ancient times, being abandoned as untenable, it was necessary for the Crown to have recourse to a doctrine of comparatively modern growth—namely, that a belt of sea to a distance of 3 miles from the coast, though so far a portion of the high seas as to be still within the jurisdiction of the admiral, is part of the territory of the realm, so as to make a foreigner in a foreign ship within such belt, though on a voyage to a foreign port, subject to our law, which it is clear he would not be on the high seas beyond such limit.' He adds, that 'the 3-mile belt is a doctrine unknown to the ancient law of England,' although he admits that, as shown by the Fourth Institute, by Selden's *Mare Clausum*,⁶ by Lord Hale *De Jure Maris*, and by Sir Leoline Jenkins, the Kings of England at an early period claimed sovereignty over the narrow seas. He next examines the various writers who, while maintaining the freedom of the seas, have expressed an opinion that an exclusive right might be acquired in respect of certain parts of the sea adjoining individual States, such as Grotius;⁷ Albericus Gentilis; Baldus; Bodinus; Loccenius;⁸ Puffendorf;⁹ Casaregis;¹⁰ Bynkershoek.¹¹ The unanimity of opinion that the littoral sea is, at all events for some purposes, subject to the domination of the local State might, in the opinion of the Lord Chief Justice, go far to show that by the concurrence of other nations such a State may deal with these waters as subject to its legislation, but he thinks that it fails to show that in the absence of such legislation the ordinary law of the local State would extend over the waters in question. Finally, he is of opinion that, although the littoral sea around England is subject to British jurisdiction for some purposes, yet that the criminal law of England does not prevail over it.¹²

§ 14.—The term 'coasts' does not properly comprehend all the *shoals* which form sunken continuations of the land perpetually covered with water, but it includes all the natural appendages of

¹ 3 Wheat. R., 610.

² 3 Wash. C. C. R., 340.

³ 5 Wheat., 144.

⁴ Bald., 15.

⁵ *Ibid.*

⁶ Book 2.

⁷ *De Jur. Bell. ac Pac.* lib. II, c. II, § 13.

⁸ *De Jure Maris*, ch. IV, § 6.

⁹ Lib. IV, c. II, § 8.

¹⁰ *Discursus de Com.*

¹¹ *De Dom. Maris.*

¹² See Debate in House of Lords, *post*, p. 96.

the territory which rise out of the water, although they may not be of sufficient firmness for habitation or use. No matter whether such appendages are composed of mud or of solid rock, they are considered as a part of the territory of the mainland, the right of dominion not depending upon the texture of the soil. This question was directly decided in a case which had reference to a little mud island at the mouth of the Mississippi River, composed of earth and trees drifted down by the river, and not of sufficient consistency to support the purposes of life.¹

§ 15.—Another case, involving the international right of domain and property, is that of islands in the sea, which do not derive their elements, on the principle of alluvion² and increment, immediately from the main shore, but are separated from it by deep channels of a greater or less width. Such islands, if in the vicinity of the mainland, are regarded as its dependencies, unless some one else has acquired title to them by virtue of discovery, colonization, purchase, conquest, or some other recognized mode of territorial acquisition.³ The ownership and occupation of the mainland includes the adjacent islands, even though no positive acts of ownership may have been exercised over them. In such a case, the attempt of another Power, without title, to colonize them, would be a just cause of complaint, and, if persisted in, of war. But if such islands be in the sea, distant from the mainland, their ownership follows the general rule of discovery, occupancy, colonization, purchase and conquest.⁴

By the Act of Congress, approved August 18, 1856, when any citizen of the United States discovers a deposit of guano on any island, rock or key, not within the lawful jurisdiction of any other Government, and not occupied by the citizens of any other Government, and shall take peaceable possession thereof, and occupy the same, such island, rock or key may, at the discretion of the Presi-

¹ *The Anna*, 5 Rob. R., 385; Wildman, *Int. Law*, vol. 1, pp. 39, 70.

² "Alluvion" is the addition made to land by the washing of the sea or river. The characteristic of alluvion is its imperceptible increase, so that it can not be perceived how much is added in each moment of time.

³ Britton, *De Purchaz*, lib. ii, ch. ii, § 8; Bracton, ch. xii, lib. ii; Justinian, *Instit.*, lib. ii, tit. ii, § 22; Callis, *On Sewers*, 46; Hale, *De Jure Maris*, passim.

⁴ By the General Act of the Berlin Conference, 1885, it is declared (Art. 34) by Austria, Belgium, Denmark, France, Germany, Great Britain, Italy, the Netherlands, Portugal, Russia, Spain, Sweden, and Norway, Turkey, and the United States that "Any Power which henceforth takes possession of a tract of land on the coasts of the African continent, outside of its present possessions, or which, being hitherto without such possessions, shall acquire them, as well as the Power which assumes a protectorate, shall accompany the respective act with a notification thereof addressed to the other signatory Powers of the present Act, in order to enable them, if need be, to make good any claims of their own," and (Art. 35) "the Signatory Powers of the present Act recognize the obligation to insure the establishment of authority in the regions occupied by them on the coasts of the African continent sufficient to protect existing rights and, as the case may be, freedom of trade and transit under the conditions agreed upon." It should be observed that this agreement only affects the coasts, not the islands, of Africa.

dent of the United States, be considered as appertaining to the United States, and the land and naval forces may be employed by the President to protect the rights of such discoverers or their assigns. Nevertheless, such islands, rocks or keys are not made a part of the union of the United States; and all acts done, and offenses or crimes committed thereon, or in the waters adjacent thereto, are to be held and deemed to have been done or committed on the high seas, on board a ship or vessel belonging to the United States, and be punished according to the laws of the United States relating to such ships or vessels, and offenses committed on the high seas.¹

§ 16.—The exclusive right of domain and territorial jurisdiction of the British Crown have immemorially extended to the bays or portions of the sea cut off by lines drawn from one promontory to another, along the coasts of the island of Great Britain. They are commonly called the *King's chambers*.² A similar jurisdiction, or right of domain, is also asserted by the United States over the Delaware Bay, and other bays and estuaries, as forming portions of their territory. Other nations have claimed a right of territory over bays, gulfs, straits, mouths of rivers, and estuaries which are inclosed by capes and headlands along their respective coasts, and the principle is well established as a rule of international law.³

§ 17.—Although the principle of this rule is not contested, differences have arisen with respect to its limitation, and its application to particular cases; or, in other words, as to what constitutes a bay or estuary or mouth of a river, and what must be regarded as a portion of the open sea, which is the property or territory of no one, but is common to all nations. As a general rule, the right of fishing in the waters adjacent to the coast belong exclusively to the inhabitants of the country whose coast it is. In 1818 a Convention was entered into between Great Britain and the United States by which it was settled that the inhabitants of British dominions in America and inhabitants of the United States should have liberty to fish and to dry and cure fish within certain portions of Newfoundland, the Magdalen Islands, Labrador, and the Straits of Belleisle, without prejudice, however, to the right of the Hudson Bay Company; the American fishermen to exercise this right under certain restrictions. By this Convention the United States 'renounced forever any liberty heretofore enjoyed, or claimed by her inhabitants, to take, dry,

¹ Brightley, *Digest of the Laws of the U. S.*, p. 301; Ortolan, *Domaine International*, § 93.

² The Convention of 1867 between Great Britain and France (which is a schedule to the 31 and 32 Vict., c. 45) defines, for the purpose of sea-fisheries, the *King's chambers* to be bays "the mouths of which do not exceed 10 miles in width."

³ Sir L. Jenkins, *Life and Works*, vol. II, pp. 727-728, 780; *Le Louis*, 2 *Dodson R.*, 245; case of the "Washington," *Com. between the U. S. and G. B.*, pp. 170-186.

or cure fish on, or within three marine miles of any of the coasts, bays, creeks, or harbours of his Britannic Majesty's dominions in America,' except as thereinbefore excepted. From 1849 to 1852 serious difficulties occurred between the inhabitants of the two countries with respect to the construction of this treaty: the one contending that the *three miles* were to be measured from a line uniting the extreme headlands of the coasts of Nova Scotia, while the other party objected to this, on the ground that the line so drawn cut off large portions of the open sea, or broad estuaries, which were the common property of all; and that such line must be drawn from one headland to the next adjacent, so as not to include these broad bays, or slight indentations, which were properly portions of the open sea. Serious collisions were at one time apprehended between the men-of-war sent by the two Governments to protect their respective fisheries. A mutual forbearance, however, prevented a resort to force, and in 1854 another treaty was made between the same Governments, but it came to an end in 1866, at the desire of the United States. By the treaty of Washington, 1871 (Art. 18), the inhabitants of the United States obtained certain additional liberty as to taking and curing fish in certain sea-fisheries of the British North American Colonies, in common with British subjects; Art. 19 gave British subjects corresponding rights in certain United States sea-fisheries. These fishery clauses lapsed in 1885 at the desire of the United States; a commission was appointed in 1887 to endeavor to effect an amicable settlement on the fishery question.¹

By an agreement between Great Britain and the United States, dated June 15, 1891, the killing of seals in that part of Bering Sea lying eastward of the line of demarcation described in Art. 1 of the treaty of 1865 between the United States and Russia, was prohibited until May, 1892; but an allowance of 7,500 seals was excepted from this agreement, to be taken on the islands of the Bering Sea for the subsistence of the natives. Afterwards, by the treaty of Washington, February 29, 1892, Great Britain and the United States of America agreed to submit to arbitration questions which had arisen respecting the taking and preserving of fur seal in the North Pacific. The Award was published in due course on August 15, 1893 (Bering Sea Arbitration Award).²

§ 18.—But, besides this claim of maritime territory over the mouths of rivers, bays and estuaries along the coast, different nations have at different times, as hereinbefore mentioned, asserted a right of property to certain narrow seas and straits adjacent to their shores,

¹ 32d Congress, 1st Sess., *Senate Ex. Doc.* No. 100; Spe. Sess., 1853, *Sen. Ex. Doc.* No. 3; President's Message, *Cong. Doc.*, 1855-6; *Annales Marit. et Colo.*, 1839, pt. 1, p. 861; De Cussy, *Droit Maritime*, v. i, tit. II, sec. 41; Elliot's *Diplomatic Code*, vol. 1. p. 281.

² It will be found set out in the first schedule of 57 Vict., ch. 2, being a statute passed to carry out the findings of the award.

and outside of any lines joining one cape or promontory with another. Such claims have generally been placed on the ground of immemorial use, or prescription. The honors and duties demanded by the State asserting such maritime supremacy have been paid or refused by other nations, according to circumstances.¹

§ 19.—The claim of Denmark to impose what are called *Sound dues* was rested by the Danish publicists and diplomatists, not only upon immemorial prescription, sanctioned by a long succession of treaties with other Powers, but upon a kind of vested right, originating in remote antiquity, recognized by the system of public law subsequently subsisting, and ratified by the acquiescence of all maritime nations from time immemorial; and they said the claim was originally founded in equity, and still has equitable considerations in its favor, in virtue of the expenses incurred by Denmark in improving the navigation of the Sound for the general benefit of commerce. They admitted 'that the general principles of the law of nations would now hardly seem to sanction the imposition of tolls similar to the Sound dues, where none before had existed.' The United States denied the *right* of Denmark to collect such dues, and 'adopted the conclusion that they are under no obligation, arising from international law or treaty stipulation, to yield to this claim,' while they admitted the 'necessity to keep up, at considerable expense, lighthouses, buoys, &c., for the security of this navigation," and that the expenditure made by Denmark for this purpose, 'may constitute an equitable claim upon foreign Powers for remuneration to the extent they have participated in this advantage,' and that 'they would not hesitate to share liberally in compensating Denmark for any fair claim for expenses she may incur in improving and rendering safe the navigation of the Sound.' 'In claiming an exemption of our ships and their cargoes from taxation, by Denmark, at the straits of the Baltic,' continues Mr. Marcy, the American Secretary of State, "the United States are vindicating a great national principle of extensive and various application. If yielded in one instance, it will be difficult to maintain it in others. If exactions upon our trade at the entrance of the Baltic were acquiesced in by the United States, similar exactions might, on the same principle, be demanded at the Straits of Gibraltar and Messina, at the Dardanelles, and on all great navigable rivers whose upper branches and tributaries are occupied by different independent Powers.' The dispute was amicably arranged by the convention of February 12, 1858, the Sound and Belts being made entirely free to American vessels and their cargoes, the United States

¹ See Halleck, ch. v, § 18; Selden, *Mare Clausum*, passim; Styman, *De Jure Maritimo*, lib. i, ch. iv, p. 179 et seq.; Gunther, *Europ. Völkerrecht*, tit. ii, p. 46; Rayneval, *Inst. du Droit Nat.*, liv. ii, ch. x; Bowyer, *Universal Public Law*, ch. xxviii; Heffter, *Droit International*, § 75; Hautefeuille, *Des Nations Neutres*, pt. i, ch. iii, § 2.

paying a fixed sum *en bloc* for lighthouses, buoys, &c.¹ Similar treaties had been entered into in 1857 by Denmark with Belgium, France, Great Britain (who compounded for 1,125,206*l.*), Hanover, Mecklenburg-Schwerin, the Netherlands, Austria, Oldenburg, Prussia, Russia, Sardinia, Sweden, and the Hanseatic towns; these were followed by treaties with Portugal and the Two Sicilies in 1858, with Turkey in 1859, and with Spain in 1860.

§ 20.—No one would now think of reviving the controversy which once occupied the pens of the ablest European jurists, with respect to the right of any one State to appropriate to its own use, and to the exclusion of others, any part of open sea or main ocean, beyond the immediate vicinity of its own coast; but it has sometimes been attempted to extend the principle of *mare clausum* to inland seas not entirely enclosed within the territorial limits of a single State. Thus, in the treaties of armed neutrality of 1780 and 1800, and in the treaty of 1794 between Denmark and Sweden, the tranquillity of the Baltic Sea was proclaimed and guaranteed; and in the Russian declaration of war against Great Britain of 1807, the inviolability of that sea, and the reciprocal guaranties of the Powers bordering upon it, were stated as aggravations of the British proceedings, in entering the Sound and attacking the Danish capital in that year. In consequence of the secret Articles of Tilsit, Great Britain demanded the surrender of the Danish fleet, with the promise of its restoration when peace should return. This proposal being rejected, Copenhagen was bombarded by the British fleet until Denmark accepted the proposal—a stern measure, required by the exigency of the occasion. The attempt, on the part of the Baltic Powers, to establish in themselves the exclusive control of the Baltic Sea, contrary to the well-established principles of international law, greatly weakened the force of their complaints against the proceedings of Great Britain toward Denmark. The law of nations does not permit any number of nations, bordering upon a sea, to combine together to close it against the commerce of the rest of the world.²

§ 21.—It is generally admitted that the territory of a State includes the seas, lakes, and rivers entirely inclosed within its limits. Thus, so long as the shores of the Black Sea were exclusively possessed by Turkey, that sea might, with propriety, be considered as a *mare clausum*; and there seemed no reason to question the right of the Ottoman Porte to exclude other nations from navigating the pas-

¹ *President's Messages*, Dec., 1854 and 1855; Marcy, *Cor. Dept. of State, on Danish Sound Dues*; Wildman, *Int. Law*, vol. 1, ch. 11; Webster's *Life and Works*, vol. vi, p. 466; Cong. Doc., H. of R., 33d Cong., 1st sess., Ex. Doc. 108.

² Bynkershoek, *De Dominio Maris*, ch. vii; Vattel, *Droit des Gens*, liv. 1, ch. xxiii, §§ 279, 286; Ortolan, *Dép. de la Mer*, tit. 1, pp. 120–126; Polson, *Law of Nations*, sec. v; Bello, *Derecho Internacional*, pt. 1, ch. 1, § 4; Hautefeuille, *Des Nations Neutres*, tit. chs. iii, iv.

sage which connects it with the Mediterranean, both shores of this passage being also portions of the Turkish territory. But when Turkey lost a part of her possessions bordering upon this sea, and Russia had formed her commercial establishments on the shores of the Euxine, both that empire and other maritime Powers became entitled to participate in the commerce of the Black Sea, and consequently to the free navigation of the Dardanelles and the Bosphorus. This right was expressly recognized by the treaty of Adrianople in 1820. The right of free navigation of the Black Sea, and the consequent right of passage through the Dardanelles and the Bosphorus, does not, however, interfere with the right of *territorial jurisdiction* which the Ottoman Porte exercises over these straits. These straits are bounded on both sides by the territory of the Sultan, and are, in most parts, less than 6 miles wide; consequently, he has a right to exclude all foreign ships of war from entering or passing either the Dardanelles or the Bosphorus. This right has been recognized in the Treaties of London, 1841, and of Paris, 1856, but was considerably modified by the Treaty of London, 1871.¹

§ 22.—The great inland lakes, and their navigable outlets, are considered as subject to the same rule as inland seas: where inclosed within the limits of a single State they are regarded as belonging to the territory of that State; but if different nations occupy their borders, the rule of *mare clausum* cannot be applied to the navigation and use of their waters. No distinction is made between salt-water lakes, or inland seas and fresh-water lakes. The right of territorial jurisdiction over the outlets of these inland waters, when narrow, and of excluding foreign ships of war, will be particularly discussed in another chapter.

¹ By the Treaty of London of 1841 the Sultan declared that, according to the ancient rule of his empire, and so long as the Porte should be at peace, he would admit no foreign vessel of war into the Dardanelles; and the five Great Powers engaged to respect this determination, which did not include the passage of light-armed vessels in the service of the ministers of friendly Powers. This right of the Porte was recognized by the Treaty of Paris in 1856; but the Powers were permitted to send light ships of war into the Danube for carrying out the regulations of police of the river. This treaty also provided for the neutralization of the Black Sea. In 1871, at the desire of Russia, the Conference of London abrogated the neutralization of the Black Sea, and declared that power be given to the Porte to open the straits in time of peace to the vessels of war of friendly and allied Powers in case it should judge it necessary, in order to secure the execution of the stipulations of the Treaty of Paris, 1856; the Commission established by Art. xvi of the Treaty of Paris for the execution of the works necessary to clear the mouths of the Danube and neighboring parts of the Black Sea from sand and other impediments was prolonged for 12 years, and all the works of the Commission were to continue to enjoy the same neutrality hitherto afforded to them. This provision was in no way to affect the right of the Porte to send, as theretofore, its vessels of war into the Danube, in its character of territorial Power. The Black Sea was expressly declared to remain open as theretofore to the mercantile marine of all nations. In the eighteenth Protocol to the Treaty of Berlin, 1878, it is to be noticed that Great Britain declares that her obligations relating to the closing of the Dardanelles do not go further than an engagement with the Sultan to respect, in this matter, his independent determination in conformity with the spirit of existing treaties.

THE 'FRANCONIA' CASE.

Page 191.—In consequence of the judgment in the case of the *Franconia* (*ante*, § 13, reported as *R. v. Keyn*, L. R. 2 Ex. D. 63), the Lord Chancellor (Lord Cairns), in February, 1878, called the attention of the House of Lords to the question of the jurisdiction of the Crown in the territorial waters of the Empire, and presented a Bill on the subject, which afterwards passed as the Act of Parliament, 41 and 42 Vict. c. 73. He said: The jurisdiction to which he had to call attention was not over rivers, bays, or harbors, because in respect of that no controversy had ever arisen, but the jurisdiction over the territorial waters in that belt or zone of the high seas which more or less surrounded the shores of the Empire. This, at first sight, would appear to be a question of law. No doubt it was a question of law, but he rather thought of that which had been described as the first law of nature—the law of self-preservation. It was necessary, to some extent and in some measure, that there should be a territorial jurisdiction over the high seas surrounding the seaboard. No empire which had a seaboard could be allowed to remain without a jurisdiction of that kind. If in the case of such an empire it was held that the jurisdiction of the kingdom ended with the dry land, the consequence would be that the subjects of that kingdom in the presence of foreigners would be absolutely without defense from the moment they entered the sea for the purpose of bathing, or fishing, or for any other purpose. Not only so, but when on dry land they would be without a protection, because if no jurisdiction from the land extended to the sea surrounding the seaboard, people from all parts of the world might come to the part of the high sea contiguous to the land and resort to practices which might be of the most serious character to people on shore. So, again, in the case of war, hostilities carried on by belligerents outside the shore might expose a neutral Power to the greatest danger. It might be asked whether the question was not solved, so far, at all events, as to the low-water mark to which unquestionably the territorial jurisdiction extended. With regard to the low-water mark it must be remembered that there were parts of the coasts where there were considerable intervals between high and low water mark, and also there were in the kingdom, as their lordships knew, many places where the sea came so close to the cliffs that there was absolutely no horizontal interval between high and low water marks. It had been suggested, or might be suggested, that if the jurisdiction of this country extended over the part of the high seas immediately adjoining the shore, inasmuch as the right of passage over that part was allowed to foreign ships, it would be unfair to claim such a jurisdiction as against them. He was quite willing to concede the right of passage

contended for, but he had imagined that it was to be conceded on this footing, and this footing only—that those who availed themselves of the right of passage should not expose themselves to any complaint of a violation of the rights of those by whom the right of passage was conceded. In truth, any such exemption would apply to the case of foreign ships coming into one of our bays. What made it necessary for him to bring this matter under the notice of their Lordships was a case of considerable interest—that of the collision between the *Franconia* and the *Strathclyde* off Dover, by which a number of persons lost their lives. [His Lordship here gave a short history of the facts.] He would endeavor to explain what he understood to be the main ground of the judgment of the majority of the judges in the *Franconia* case. But before he did so, there was an incident which he wished to mention to their Lordships. One of the learned judges, for whom they all had the greatest respect, and whose judgment, from his experience in criminal cases, was of the greatest weight—Mr. Justice Lush—stated that though he concurred with the Lord Chief Justice in that learned Judge's view of the case, yet he wished to guard himself in this particular case with respect to the limits of the high seas. He said:

I wish to guard myself from being supposed to adopt any words or expressions which may seem to imply a doubt as to the competency of Parliament to legislate as it may think fit for these waters. I think that usage and the common consent of nations, which constitute international law, have appropriated these waters to the adjacent State, to deal with them as the State may deem expedient for its own interests. They are, therefore, in the language of diplomacy and of international law, termed by a convenient metaphor the territorial waters of Great Britain, and the same or equivalent phrases are used in some of our statutes, denoting that this belt of sea is under the exclusive dominion of the State. But the dominion is the dominion of Parliament, not the dominion of the common law. . . . Therefore, although, as between nation and nation these waters are British territory, as being under the exclusive dominion of Great Britain, in judicial language they are out of the realm, and any exercise of criminal jurisdiction over a foreign ship in these waters must, in my judgment, be authorized by an Act of Parliament.

As he understood these words, if Sir Robert Lush had found that in the particular place Parliament had stepped in and said that portion of the water was part of the United Kingdom, he would have been of opinion that the Crown had territorial jurisdiction over it, and the conviction ought not to be quashed. It was fortunate for the prisoner in the *Franconia* case, though not fortunate for the vindication of the law, that Mr. Justice Lush was under the impression that that had not been done which really had been done.

It appeared that in an Act of 1848 for the regulation of Customs there was a provision authorizing the Lords of the Treasury to establish ports in many places where ports were required, and to define their limits. Under that provision the Lords of the Treasury issued a warrant, which was inserted in the *London Gazette* of March 3, 1848. In that warrant were these paragraphs:

That the limits of the port of Dover shall commence at St. Margaret's Bay aforesaid, and continue along the said coast of Kent to Copt Point in the said county. That the limits of the port of Folkestone shall commence at Copt Point aforesaid, and continue along the coast to Dungeness, in the said county.

And we, the said Commissioners of her Majesty's Treasury, do further declare that the limits seaward of the said ports shall extend to a distance of three miles from low-water mark out to the sea, and that the limits of such ports shall include all islands, bays, harbours, rivers, and creeks within the same respectively.

So that under Parliamentary powers the proper authorities had declared long before the *Franconia* case that the limits of the port of Dover extended 3 miles out to sea. We understood the view of the majority of the judges to be this, that there was one jurisdiction by land and the other by sea; that the jurisdiction by land was one limited by the limits of counties, taking into the county the low-water mark and the harbors and rivers within the county; and the jurisdiction by sea, the old jurisdiction of the Lord High Admiral now exercised by the Central Criminal Court; that the jurisdiction of the Lord High Admiral extended to the high seas, but the persons over whom it was exercised must be British subjects, not foreigners; and that the Central Criminal Court had no jurisdiction over the persons of foreigners beyond the low-water mark. That he understood to be the common ground on which the majority of the judges acted in quashing the conviction. And taking that as the *ratio decidendi* of the judges in a decision which he accepted, it would at first sight appear that there was nothing more for him to do than to ask the favorable consideration of their Lordships for a Bill to amend the law; but there fell some observations from Sir Robert Phillimore, the Lord Chief Baron, and the Lord Chief Justice, whose judgment was the most elaborate, and might be regarded as the leading judgment of the majority, and which contained a principle that seemed to challenge the right of Parliament to legislate on this subject. Expressions of the Lord Chief Justice would certainly seem to imply that we could not legislate with respect to the high seas even within the limits of the belt or zone to which he had referred without the consent of foreign nations, or until after communication with foreign nations. That was a very serious question. If the judgments

of those learned judges amounted, as they were supposed to do, to a proposition of that kind, of course Parliament would be exceeding its powers if it entered into legislation applying to that belt or zone with the view of making foreigners amenable to our law. But he would ask their Lordships to consider whether there was any foundation for that principle. He ventured to think there was not, and he thought it would be a very serious thing if there were. He would lay before their Lordships the views of great constitutional writers of this Kingdom and of the United States on this question. Then he would add the views of international jurists on the Continent, and next he would show what our own judges had ruled in international cases, and lastly he would direct attention to what their Lordships themselves had done in the course of legislation. [His Lordship here referred to the principal English, American, and foreign writers on international law.] It appeared to be established as a matter of principle that there must be a zone. The only doubt was as to how far our limit extended. The authorities were clear on this—that if 3 miles were not found sufficient for the purpose of defense and protection, or if the nature of the trade or commerce in the zone required it, there was a power in the country on the seaboard to extend the zone; but at present there was a consensus of opinion among the authorities that certainly the jurisdiction extended to 3 miles. If that were not the established law, nations with a seaboard would be very much worse off than those which had none, because a neighbor on land you could make a treaty with or treat as an enemy, but if a nation with a seaboard had no control over a zone it would always be liable to dangerous aggression from beyond the sea. [Hear! Hear!] He would now refer their Lordships to judicial opinion. In a case in which Prussia claimed restitution of a ship seized by an English man-of-war within 3 miles of Prussian territory, Lord Stowell said:

A claim has been given for the Prussian Government, asserting the capture to have been made within the Prussian territory. It has been contended that although the act of capture itself might not have taken place within the neutral territory, yet that the ship to which the capturing boats belonged was actually lying within the neutral limits. The first fact to be determined is the character of the place where the capturing ship lay, whether she was actually stationed within those portions of land and water, or of something between water and land, which are considered to be within Prussian territory. She was lying within the eastern branch of the Ems, within what I think may be considered at a distance of 3 miles at most from East Friesland. I am of opinion that the ship was lying within those limits in which all direct operations are by the law of nations forbidden to be exercised. No proximate acts of war are in any manner to be allowed to originate on neutral grounds, and I cannot but think that such

an act as this, that a ship should station herself on neutral territory and send out her boats on hostile enterprises, is an act of hostility much too immediate to be permitted. The capture cannot be maintained.

In another case—that of the *Maria*¹—Lord Stowell said:

It might likewise be improper for me to pass over entirely without notice, as another preliminary observation, though without meaning to lay any particular stress on it, that the transaction in question took place in the British Channel, close upon the British coast, a station over which the Crown of England has from pretty remote antiquity always asserted something of that special jurisdiction which the sovereigns of other countries have claimed and exercised over certain part of the seas adjoining to their coasts.

He would now refer their Lordship to an opinion expressed by Sir John Nicholl on a claim by a lord of a manor to goods derelict. Sir John said:

As to the right of the lord extending 3 miles beyond low water, it is quite extravagant as a jurisdiction belonging to any manor. As between nation and nation, the territorial right may, by a sort of tacit understanding, be extended to 3 miles; but that rests upon different principles—viz., that their own subjects shall not be disturbed in their fishing, and particularly in their coasting trade and communications between place and place during the war. They would be exposed to danger if hostilities were allowed to be carried on between belligerents nearer to the shore than 3 miles.

A case occurred when the Duke of Wellington held the office now held by his noble friend (Earl Granville). In 1829, within 3 miles of one of the Cinque Ports, some fishermen at sea were fortunate enough to discover a whale valued at 370 *l.* A claim to the fish was made by Lord Warden, and the Admiralty claimed against him. The learned judge who tried the question came to the conclusion that the office of Lord Warden of the Cinque Ports was more ancient than that of Lord High Admiral, and the Lord Warden of the Cinque Ports succeeded in carrying away the whale. What were the views of Dr. Lushington? He said:

What are the limits of the United Kingdom? The only answer I can conceive to that question is—the land of the United Kingdom and 3 miles from the shore.

Again, the same learned judge, speaking on the question of compulsory pilotage, said:

The Parliament of Great Britain, it is true, has not, according to the principles of public law, any authority to legislate for foreign vessels on the high seas, or for foreigners out of the limits of British jurisdiction; though, if Parliament

¹ 1 Rob. *Adm. R.* 352.

thought fit to do so, this Court, in its instance jurisdiction at least, would be bound to obey. In cases admitting of doubt, the presumption would be that Parliament intended to legislate without violating any rule of International Law, and the construction has been accordingly. Within, however, British jurisdiction, namely, within British territory, and at sea within 3 miles from the coast, and within all British rivers *intra fauces*, and over foreigners in British ships, I apprehend that the British Parliament has an undoubted right to legislate.

Then he would add to that the opinion of the late Lord Wensleydale in that House in "*Gammell v. The Commissioners of Woods and Forests*,"¹ a well-known Scotch salmon-fishery case:

It may be worth while to observe that it would be hardly possible to extend it seaward beyond the distance of 3 miles, which, by the acknowledged law of nations, belongs to the coast of the country, is under the dominion of the country by being within cannon range, and so capable of being kept in perpetual possession.

In advising that House in another case, a noble and learned friend (Lord Chelmsford), whom he was glad to see there to-night, and who held the office which he (the Lord Chancellor) had the honor to hold, said:

The 3-mile limit depends upon a rule of International Law, by which every independent State is considered to have territorial property and jurisdiction in the seas which wash their coast within the assumed distance of a cannon shot from the shore.

He would add to that the opinion expressed by another noble and learned friend of his (Lord Hatherley), whom he was also glad to see there. His noble and learned friend, in the case of a collision between a foreign and a British ship, said:

With respect to foreign ships. I shall adhere to the opinion which I expressed in "*Cope v. Doherty*,"² that a foreign ship meeting a British ship on the open ocean cannot properly be abridged of her rights by an Act of the British Legislature. Then comes the question, how far our Legislature could properly affect the rights of foreign ships within the limits of 3 miles from the coast of this country. There can be no possible doubt that the water below low-water mark is part of the high sea. But it is equally beyond question that for certain purposes every country may, by the common law of nations, exercise jurisdiction over that portion of the high seas which lies within 3 miles from its shores.

¹ 3 Macq. H. L. 419.

² 2 De G. and J., 614.

In the case of the "Free Fisheries of Whitstable v. Gann,"¹ Sir William Erle said:

The soil of the seashore to the extent of 3 miles from the beach is vested in the Crown.

Now, these were the opinions—and as far as he was aware there was no opinion the other way—of the eminent judges who had considered this subject. He said he would inform their Lordships what had been done in the way of legislation. He might refer their Lordships to many Acts of Parliament, but he would only refer to one. He would take the last edition of the Foreign Enlistment Act. That was an Act which, if the words "deliberation," "care," might ever be applied to the passing of an Act, might be applied to the passing of it. It was brought forward by the Government of the day under the advice of its legal advisers. It had also the gravest consideration from many persons outside the Government. What that Act did was this: it provided that "this Act shall extend to all the dominions of her Majesty, including the adjacent territorial waters." He had troubled their Lordships with these references because he felt bound, after the doubts supposed to be cast on the question, to establish the position that their Lordships were entitled to legislate as he proposed. The right which we claimed over the high seas was a right which we had always exercised, and he asked their Lordships to pass an Act for the purpose of obviating the doubts he had pointed out. Her Majesty's Government did not wish to make any new enactment as regarded the case of British subjects within the territorial waters of this country. No person doubted the full jurisdiction of the Crown over them. It was only in the case of those who were not British subjects that doubts had been expressed. With regard to those who might be foreigners, and temporarily within the 3-mile limit, her Majesty's Government wished that there should not be an absolute necessity of proceeding against them for a breach of our law. They proposed to enact that an offense committed by a person who was not a subject of her Majesty on the open sea within the territorial waters of her Majesty's dominions, although the offense might have been committed on board a foreign ship, might, with the consent of one of the principal Secretaries of State, be tried by a British tribunal.

Lord Selborne said that as far as the case connected with the *Franconia* proceeded on a technical ground for the trial of a criminal offense on the high seas, within the territorial waters of this country, he did not profess to entertain an opinion which would entitle him to criticize the judgment of the majority of the judges; but he must say that on reading that judgment some doubt was entertained

¹ 11 C. B. (N. S.), 413.

as to the existence in principle of the territorial right properly so called in the Sovereign of this country over waters which all writers on International Law had regarded as territorial waters. It was by the general consent of nations that the 3-mile limit had been fixed, and within that limit other nations claimed exactly the same jurisdiction and rights that we ourselves claimed. The Bill proposed, very properly, to assert our right to punish criminal offenses committed within that limit, and much prudence was shown in not seeking to extend by this measure our jurisdiction for this purpose beyond the 3-mile limit. It had been argued that, in consequence of the increase in the range of artillery, that limit should be extended to 5 or even 6 miles; but although that might be a very sensible alteration to make in International Law, it should only be effected by the general consent of all nations.

On the motion for the second reading of this Bill,

The Lord Chancellor wished to correct a misapprehension which appeared to have prevailed out of doors in reference to his statement on introducing the Bill. It appeared to be supposed that he had stated to their Lordships that the judges who decided the *Franconia* case had overlooked an Act of Parliament, and that if the Act had not been overlooked there might have been a different decision. What he had stated was this. He had read to their Lordships a passage from the judgment of Mr. Justice Lush, in which the position was laid down that if Parliament had legislated in reference to the waters where the collision had occurred it would have conferred jurisdiction on the Court. In reference to that statement he (the Lord Chancellor) pointed out that under the Regulation of Customs Act of 1848 the Commissioners of the Treasury made an order declaring the limits of the port of Dover to extend 3 miles out to sea, and that the collision had occurred within that limit. But that order could not possibly be known to the learned judges unless it had been specially brought under their notice. It was not known to himself until a gentleman connected with one of the public offices had called his attention to the subject. He did not wish it to be supposed that he had said that the learned judges had overlooked anything which should have properly come under their notice.

HAUTEFEUILLE: *Des Droits et des Devoirs des Nations Neutres en Temps de Guerre Maritime.* Third edition. Paris, 1868.

Volume 1, title 1, chapter 3, page 50.—The principle of the liberty of the seas bears two exceptions important to note. They are derived from the very nature of certain parts of the sea and disclose reasons

which serve as the basis for the liberty of the ocean. The primitive law can neither be altered nor destroyed by human laws; but we must recognize that the exceptions of which I shall speak result positively from primitive law and not from human or secondary law. The treaties concluded between States have undoubtedly commentated the first provisions of natural law; but far from destroying them, they have made them clearer and more useful.

The principal reasons on account of which the sea can not be subject to the property of man are: First, the impossibility of retaining it under his control and consequently excluding others from it; second, its immensity and its inexhaustible character, which remove every interest in its exclusive possession. The parts of the ocean which do not share these qualities which, on the contrary, by their nature, are susceptible of being dominated by human force, the possessor of which may exclude other men and has a powerful interest in maintaining this exclusion, finally those parts whose common use could not be conserved without harming the most interested nation and whose nature is such that it is not inexhaustible—these portions of sea may not be subjected to the right of property. This is the case with territorial seas and closed seas.

Territorial seas.—Those parts of the sea which wash the coast which immediately adjoin them and serve them as frontiers are called by publicists territorial seas. According to the principles of primitive law the ocean is free. This is not the case with territorial seas; they are, on the contrary, subjected to the sovereignty of the nation, mistress of the coast washed by them. They are under its domination in like manner as the land. This is not a derogation from the immutable rules of primitive law. It is merely an exception to the general principle derived from that law itself, which rests upon the nature of the territorial sea, on the absence of the condition which placed the ocean beyond human possession.

The high sea, as we have established, can not be put into the actual possession of a people. The territorial seas, on the contrary, may be subjected to the power of the nation that is proprietor of the neighboring lands. This nation has the power of excluding others from it, and its interest requires that it use this power, because the liberty of navigation would considerably restrict its enjoyment and compromise its security. These three points established, it is evident that according to primitive law the territorial sea is susceptible of being subjected to the sovereign domain—it is the property of the adjacent State. . . .

This bordering State has not only the power over this portion of the sea, but also a powerful interest in removing others from these shores, in limiting and regulating navigation; that is, in excluding them from its free use because this liberty interferes with its own

enjoyment and because if it did not exercise this power of exclusion it could not derive all the advantages which from its actual possession it could hope for. The parts of the sea which immediately touch the coasts in a way forms a rampart, a line of defense for these shores; to permit its free use to all, without exception or conditions, in a word, to assimilate them to the high sea would be to expose the States washed by the ocean to the most sudden and unforeseen aggressions and consequently the most difficult to repel. It would deprive these States of the fortification raised by nature for their defense. . . .

This diversity of opinions, which generally leaves the true limits of the territorial sea open to the arbitrary opinions of the interested parties and consequently creates causes of war among all nations, has a unique cause. All the authors whom I have cited have lost from view the principles which govern the maritime domain—the only basis upon which it rests. To fix these limits in a precise way applicable to all cases, we must go back to those principles that I have just explained.

The sea is absolutely free except the waters washing the coast. These waters are part of the domain of the adjacent State. The reasons for this exception are: First, that these portions of the ocean are susceptible of a continuous possession; second, that the people which possess them may exclude others from them; third, that, in the interest of its security and the preservation of the advantages derived from the territorial sea, it must establish this exclusion. These causes known, it is easy to fix the limitations. The maritime dominion ends where continuous possession ends, where the proprietary State can no longer exercise its power, at the place at which it can no longer exclude foreigners, and, finally, at the place where their presence, no longer endangering its security, it no longer has any interest in excluding them.

Now, the three causes which make the sea susceptible of private possession cease at the same point. That point is the limit of power represented by instruments of war. The space covered by projectiles discharged from the shore protected and defended by the power of these engines is territorial domain, and subjected to the domain of the master of the shore. The greatest range of cannon placed on shore is actually, therefore, the limit of the territorial sea.

In fact, this space alone is actually subject to the power of the territorial sovereign; there and there alone can he enforce his laws. He has the power to punish malefactors and to exclude those he desires. Within this limit the presence of foreign vessels may threaten his security; beyond it, their presence is a matter of indifference to him; it can cause him no anxiety for beyond the cannon range they can not harm him. The limit of the territorial sea

is actually, according to primitive law, the range of a cannon placed on shore.

Secondary law has sanctioned this rule; the majority of treaties on the subject have adopted the same rule. Grotius, Hübner, Bynkershoek, Vattel, Galiani, Azuni, Klüber, and almost all modern publicists of greatest authority have taken the range of cannon as the only limit of the territorial sea which was rational and in conformity with principles of primitive law. This natural limit has been recognized by a great number of States in their municipal laws and regulations.¹

It is important to note that to preserve their domain over the territorial sea it is not necessary for the adjacent State to erect fixed and permanent batteries, fortresses, etc., nor that its cannon be at all times ready to cover all parts of this sea with their fire. The absence of these means of coercion, either temporary or permanent—for all parts of the shore can not be armed—does not interfere with the right itself nor change the limits which we have just assigned. The nation, sovereign of the land washed by the tide, is by that fact alone sovereign of the territorial sea and exercises its rights over its land and sea dominion as best serves its interests, the mode of exercise in no way diminishing its actual right.

The seacoasts do not present a straight and regular line. They are on the contrary almost always cut by bays, capes, etc. If the maritime domain were always to be measured from every point of the coast, great inconveniences would result. Thus it is agreed by usage to draw an imaginary line from one headland to another and to take this line as the point of departure for the range of cannon shot. This method adopted by almost all States, applies to small bays only and not to gulfs of wide extent like the Bay of Biscay and Gulf of Lyons, which in fact are great portions of sea entirely open and whose complete assimilation to the high sea it is impossible to deny.

A modern author (Boucher) has expressed the wish that all nations may agree to determine exactly and mathematically the extent of the territorial sea or rather the range of cannon shot upon a uniform standard of measurement in fixing its extent. He proposes the adoption of French measurement because its basis is in nature. It would certainly be very desirable, whatever the standard adopted, that the territorial seas of each country be fixed in a definite manner. However, I do not believe that it is possible to reach this result. Besides, the experienced eye of mariners and coast guards can pretty well determine the range of cannon shot.

¹ See the following regulations: Tuscany, Aug. 1, 1778, Article 1; Genoa, July 1, 1779, Article 1; Venice, Sept. 9, 1779, Article 9; Russia, Dec. 13, 1878, Article 2; Austria, Aug. 7, 1803, Article 11. *Post*, pp. 596, 597, 620, 509.

THE INSTITUTE OF INTERNATIONAL LAW.

[The value of the conclusions of this unofficial but highly authoritative international society of publicists is very great. The Institute was organized in September, 1873, at Ghent. Mr. Gustave Rolin-Jaequemyns, a Belgian scholar, advocate and statesman, took the lead in effecting the organization, although Dr. Francis Lieber had long before suggested the plan. It is an organization of specialists whose work has been of a scientific character. Through its efforts many unsettled questions have been carefully discussed and the results of the discussions stated in the form of rules which have often served as the basis of later definite action by international conferences and have been regarded as high authority by statesmen, diplomatists, and lawyers. Probably the best known of the works of the Institute is its Code of the Laws of War on Land adopted at the Oxford meeting in 1880, but there is hardly any vexed question of international law that has not received its painstaking study. Among its members are to be found over forty judges of the Permanent Hague Court, some of whom are: Alvarez (Chile), Alhucemas (Spain), Belraõ (Portugal), Bourgeois (France), Bustamante y Sirvén (Cuba), Dato Iradier (Spain), Descamps (Belgium), Fusinato (Italy, Gram (Norway), Hagerup (Norway), Hammarskjöld (Sweden), Hellner (Sweden), Hilty (Switzerland), Huber (Switzerland), Kalindero (Roumania), Kebedgy (Greece), de Laboulaye (France), de Labra (Spain), Lambermont (Belgium), Lammasch (Austria-Hungary), Lardy (Switzerland), Von Liszt (Austria-Hungary), Martens (Russia), Von Martitz (Germany), Matzen (Denmark), Moore (United States), Motono (Japan), Nys (Belgium), Olivecrona (Sweden and Norway), Plener (Austria-Hungary), Politis (Greece), Renault (France), Rolin-Jacquemyns (Belgium), Root (United States), Schönborn (Austria-Hungary), Streitt (Greece), Taube (Russia), Torres Campos (Spain), Vedel (Denmark), Vesnitch (Serbia), Westlake (Great Britain), Zeballos (Argentine Republic); and among the names of its members in the nineteenth century are found: Lieber, Wharton, Woolsey, Twiss, Phillimore, Mountague Bernard, Bluntschli, Bulmerincq, David Dudley Field, Geffcken, Heffter, Hautefeuille, Holtzendorff, James Lorimer, Perels. Of the writers quoted in this volume the following were or are members of the Institute: Barclay, Bluntschli, Calvo, Carnazza-Amari, Cauchy, Despagnet, Fiore, Hall, Hautefeuille, de Lapradelle, Lawrence, von Liszt, Fedor Martens, Nys, Olivart, Lassa Oppenheim, Perels, Phillimore, Pradier-Fodéré, Rivier, Schücking, Twiss, and Westlake.]

The Institute has dealt with the subject of territorial waters at various times and in various connections: (1) with reference to the expected Third Hague Conference, through a special committee; (2) on the general subject through the regular committees appointed to study it; and (3) incidentally to the laws of naval warfare in general and with respect to cables, submarine mines, and straits.]

I.—Preparation for the Third Hague Peace Conference.

[The Final Act of the Second Peace Conference held at The Hague in 1907 having concluded with the following declaration:

Finally, the Conference recommends to the Powers the assembly of a Third Peace Conference, which might be held within a period corresponding to that which has elapsed since the preceding Conference, at a date to be fixed by common agreement between the Powers, and it calls their attention to the necessity of preparing the program of this Third Con-

ference a sufficient time in advance to ensure its deliberations being conducted with the necessary authority and expedition.

In order to attain this object the Conference considers that it would be very desirable that, some two years before the probable date of the meeting, a preparatory committee should be charged by the Governments with the task of collecting the various proposals to be submitted to the Conference, of ascertaining what subjects are ripe for embodiment in an international regulation, and of preparing a program which the Governments should decide upon in sufficient time to enable it to be carefully examined by the countries interested. This committee should further be intrusted with the task of proposing a system of organization and procedure for the Conference itself.

The Institute of International Law at the time of its Paris session in 1910 decided that the time was opportune to name "a Committee of nine members to investigate and select the studies which would be the most useful in preparation for the Peace Conference, and to organize the discussion of them by the Institute.

"In execution of this decision it immediately voted in general assembly upon the designation of the nine members of the Committee, and Messrs. Renault, Hagerup, Edouard Rolin, J. B. Scott, Westlake, Fauchille, Fromageot, Holland and von Bar were appointed."

This Committee met in Paris in October, 1911, and drew up a list of questions that might usefully appear on the program of the next Peace Conference. This it did by beginning with the recommendations of the Second Conference and proceeding through the Conventions of 1907 in their order, and lastly by making a list of all questions suggested by its various members. In the last class was the "definition and regulation of the territorial sea," which later appeared.—after, by a process of elimination, the number of questions on the Committee's list as being those which could be profitably studied in view of the next Peace Conference had been reduced to twelve,—as number "VI. Determination of territorial sea and regulations therefor."

The report of the Committee, through its president, Mr. Louis Renault, and secretary, Mr. Edouard Rolin (*Annuaire*, 1912, p. 23), contains the following summary account of the treatment of this subject by the Committee:]

Territorial waters; revision of the resolutions of the Institute upon this subject.

In the course of the discussion, emphasis was given to the fact that this question is of particular present importance. Projects of laws are being prepared in various countries, and it is possible that they may give rise to protest from within the field of international law. It is possible that an international Conference may be requested to look into this matter, without awaiting the meeting of the next Peace Conference.

In view of this, the following resolution was adopted:

The Committee calls the attention of the Sixth Committee of the Institute now engaged with the examination of the question of territorial waters, to the present importance of that question, and to the desirability that the Sixth Committee should present the result of its labors to the Institute at a date sufficiently early to allow of the question being placed on the program of the next Peace Conference.

[The Institute at its Christiania session in 1912 took up the report of the special Committee question by question in its meeting of August 27. The por-

tion of the minutes dealing with the subject of the territorial sea is as follows:]

The President submits to the Institute the sixth number on the list prepared by the Committee "The territorial sea; revision of the resolutions of the Institute on this subject."

The reporter, Sir Thomas Barclay, thinks that the study of this question might usefully be postponed by the Institute to a later session. The Institute gives its assent to this suggestion.

II.—The General Subject of the Definition and Régime of Territorial Waters.¹

[The question was placed on the program of the session of Lausanne in 1888. Messrs. Renault and Barclay were appointed reporters. At the Hamburg session in 1891 Mr. Renault made a report,² to which was added a note by Mr. Aubert.³ The first exchange of views in plenary session took place September 8 and 10, 1891.⁴ At the Geneva session in 1892 there were presented a report by Mr. Barclay, a communication from Mr. Kleen, a communication from Mr. Aubert, and modified conclusions by Messrs. Barclay, Desjardins, Féraud-Giraud, Harburger, Hartmann, Olivart, Perels and Edouard Rolin.⁵ These documents led to an exchange of views in plenary session September 10, 1892.⁶ At the Paris session in 1894 Mr. Barclay presented a new report,⁷ from which the following extracts are taken:]

DEFINITION AND RÉGIME OF THE TERRITORIAL SEA.

Page 125.—GENTLEMEN: At our Geneva session I presented to you the report of the conclusions which had been discussed in committee only. In these conclusions I had proposed, among other things, to fix the limit of the territorial sea, with exceptions justified by immemorial usage, at 3 marine miles from low-water mark. Some of our colleagues did not agree with me on these limits, and in view of the very pronounced disagreement on this point I modified my project so as to leave the extent of the territorial sea blank. The project, with some other modifications not affecting the principle of the solutions which I proposed, was accepted by some of our colleagues in the form you are all acquainted with.

In order to obtain the opinion of those of our colleagues who were not at the Geneva session on the project as it was finally framed, I addressed a circular last November to the members of the committee, asking them to note modifications which they considered appropriate, and requesting them to notify me in what points it was contrary to the laws, jurisprudence, or existing usage which it would be difficult

¹ *Annuaire de l'Institut de droit international*, vol. 20, p. 341.

² *Ibid.*, vol. 11, p. 133.

³ *Ibid.*, p. 136.

⁴ *Ibid.*, pp. 147, et seq.

⁵ *Ibid.*, vol. 12, pp. 104, 136, 145, 151.

⁶ *Ibid.*, pp. 152, et seq.

⁷ *Ibid.*, vol. 13, p. 125.

to reform, and above all to specify the distance which, in their opinion, recommended itself as the ordinary limit of the territorial sea.

At the same time I sent them a copy of a publication of the Association for the Reform and Codification of the Law of Nations, containing the replies received to the *questionnaire*, which I had circulated, as reporter of a committee on this same subject. Some of these replies are real essays, and the whole forms a body of information of extreme value.

Since then I have received from several of our colleagues replies which I shall sum up and examine, after having explained in general terms the utility of the project which has been submitted to you.

II.

The fundamental principle of the project was to differentiate between the zones necessary to safeguard the rights of neutral countries; that is, the line of respect, and the narrower zone, so to speak, the real territorial sea which States claim exclusively for their nationals and over which they claim to be absolute sovereigns, except upon one point.

The line of respect of neutrality, the line fixed at the actual range of cannon shot, creates a zone whose width is as variable as the range of cannon itself. Now, for the territorial zone, properly so called, we must establish a limit which exactly fixes the distance, especially the extent in which fishing is reserved to the adjacent State.

This distinction is the essential point of my project. The problem consists in settling the difficulty arising on the one hand from the manifest insufficiency of the usual distance of 3 marine miles in matters of neutrality and on the other from the inconvenience which would result in placing under the sovereignty of the adjacent State a marginal sea corresponding to the actual range of cannon.

The range of cannon is a standard which conforms but slightly to questions arising during a state of peace, notably the matter of fishing. In its actual form calculated from the shore this notion is even contested for neutrality. Let us not forget that the range of cannon from the shore is a fiction, and has never been anything but a fiction. It is the invention of Bynkershoek, who thus found a formula and reduced to a common and reasonable limit of different and more or less exaggerated claims. An effective domination over the maritime belt has never been exercised by any State except in the neighborhood of its ports. Consequently we need not ascertain whether, from the point of view of effective domination, there is

anything to modify. We have only to consider from the point of view of interest of the dominating State in time of peace the utility of the extension of the customary zone of 3 miles and the nature of the rights which the adjacent State possesses over this zone.

The question of the rights of neutrals is quite another.

In the time of Bynkershoek, and almost to our day, the range of cannon and the fishing zone could well coincide. This range of about 3 marine miles generally sufficed as to the limit in which fishing was reserved; but in recent years the range of cannon has sensibly changed, so that the necessary distance for carrying on fishing by riparians and the distance necessary for effective protection of neutrals against belligerent acts are no longer to be confounded. We are forced by modern circumstances to make a distinction which our forefathers did not find necessary.

The question now before the Institute is to settle, by regulations based on the reason of circumstances, difficulties that make it plain that under modern conditions the old principles and procedures need to be examined and perhaps altered. * * *

III.

Page 129.—Let us now examine the replies to my circular. Since the question is with reference to the project finally submitted at our Geneva session, I take the articles of that project, one by one, giving the views of our colleagues, with my own in the form of a commentary.

The Institute of International Law united in plenary session at Geneva . . . , 189— . . . ,

Considering that the territorial sea comprises in principle the entire zone over which the adjacent State from the shore may exercise its empire, but that in practice compromises have been effected in the application of this principle,

Recommends to the maritime powers united in congress the adoption of the following rules concerning the status of the territorial sea.

MR. WESTLAKE proposed the suppression of the entire second paragraph. He does not believe that the principle of Bynkershoek ever passed into international law so that it may be said that it is that principle which regulates the subject and that the limit of 3 miles, or any other limit, is a practical compromise of that principle. According to him, Bynkershoek ought rather to be considered as having only suggested the rules which practice has established.

If we leave the preamble as it is we expose ourselves, he says, to authorize the claim of exaggerated extent of sea by States which are not bound to abide by any other limit.

I do not entirely share the opinion of Mr. WESTLAKE on this subject.¹ However, his observations have led me to extend the consideration of the preamble in order better to define the object and extent of the project. . . .

Article 2. The zone of the territorial sea extends . . . from low-water mark along the entire coast, unless a continuous and established usage shall have sanctioned a wider zone.

Mr. DE MONTLUC finds that the low-water mark is not a sufficiently precise term.²

Mr. DEN BEER POORTUGAEL framed an interesting note in which he gives his reasons in favor of fixing the limits at five or six miles.

Mr. WESTLAKE proposed five miles. Mr. DE MONTLUC six miles as the minimum. Sir TRAVERS TWISS, like Mr. HOLLAND, prefers a limit of three miles; Mr. MOORE likewise seems to favor a limit of three miles.

Mr. HARBURGER sets a limit of three miles "for jurisdiction and police," but for fishing and customs he believes it necessary in certain cases to establish a wider zone of protection, and for neutrality he sees nothing else possible than the range of cannon.

Mr. KLEEN, on the exception of distances from the rule which is to be stated, fears the inconvenience resulting from the difficulty in establishing a general usage. He is, nevertheless, inclined to maintain the exception of established usage, while proposing a zone which

¹ Mr. Martens, who did not answer me directly, expressed himself at length in the first number of the *Revue Générale de Droit International Public* on the question of the distance. [For the portion of Mr. Marten's article quoted by Mr. Barclay in this report, see *post*, p. 294.]

² I transcribe the objections of Mr. de Montluc, the importance of which will not escape our colleagues :

In the first place this phrase can only be applied to tidewaters. For seas without tide it would be necessary to adopt the Spanish expression, *mayores olas en los temporales* or take the Italian system, 65 meters from shore. Moreover, even for seas with tides, it may be asked if your phrase means ordinary low water or if it means low water of high tides. That makes a difference of several miles on certain coasts. This is perhaps what makes certain Germans prefer counting from the high-water mark. But there again the difference might be considerable, although generally less, between ordinary flood tide and the highest tide at the equinox. Besides, it seems to me prudent to specify this, that it is necessary to hold to a line parallel with the general trend of the coast. * * * Again, I am of opinion that it is necessary to take into account islands, islets, rocks, banks, and consequently to speak of them expressly. My opinion is that the territorial sea runs from the last rock, island, islet, emerging bank, on condition that they are included in the number of miles fixed for the zone. For example, I would count the territorial zone opposite the Bay of Audierne (Finistère) from low water at high tide on the island of Seins, if that island is within the zone. And I would create around each island, islet, rock, emerging bank a little circling zone for those that would not be included in the zone of the territorial sea.

Compare the following remarks of Mr. Aubert :

A question perhaps more important still for Norway is that of knowing from what base the width of the territorial sea should be measured. The rocks of the land are continued under the sea and often emerge therefrom at a great distance ; for example, in Lofoten in the form of islands or islets. We have regarded it as quite natural that when the island is not situated more than 2 old marine miles (2/15 of a degree) from the land the width of the territorial sea should be extended to a mile beyond the island, and thus on from island to island.

would satisfy Norway, that is a zone of four miles.¹ Personally Mr. Kleen prefers five miles.

Mr. STRISOWER² says that since it is a question between different claims, he believes that five marine miles ought to be recommended, but he would go up to ten miles.

Mr. MARTENS is in favor of ten miles.

On the other hand, two propositions were made in the report of the association. One was that of Mr. Andrew R. Gordon, of Canada, lieutenant in the navy, who, while maintaining three miles as the limit for exclusive fishing, would give to the adjacent State the *right of regulating* fishing up to nine miles from the shore. To justify this proposition, Mr. Gordon invokes the general utility of applying over the widest margins of the territorial sea rules having for their object the prevention of the extinction of the fish. He does not propose, it is to be noted, to exclude foreign fishermen beyond three miles, but only to subject them to the regulations of

¹ As to the limit of 3 miles Mr. Kleen observes: "Among maritime Powers the following have declared themselves against it by the organ of their ministry of foreign affairs: Spain and the United States during the war of secession; Russia, in 1874, to one of the envoys accredited to St. Petersburg; Germany, Austria, and Italy in the same year in reply to the proposition then made of fixing everywhere a uniform distance; finally, Denmark, during the debates concerning the project of the international convention regarding the Sound. In general the States agreed that the minimum is to be 4 miles. Norway and Sweden officially declared on many occasions, especially in December, 1874, to the British Government that they could never adhere to an international convention which should establish a maritime zone of less than 4 marine miles, and that because of the impossibility otherwise of maintaining order on the Scandinavian shores. So far as I can see there is no chance of securing a universal agreement upon the principle of 3 miles."

² Mr. Strisower gives the following valuable details respecting Austrian legislation:

"If a foreign warship comes within cannon shot without flying its flag, the nearest fortified work should fire blank at first and then with shot (sec. 9 of the Imperial Ordinance of May 20, 1866). It is not permitted foreign warships to sound waters within cannon range of fortified works with boats or to make plans there (sec. 10, *ibid*). Within cannon range of an armed port target practice is prohibited to foreign warships; in other ports permission of the administrative authority is required (sec. 11, *ibid*).

"According to several ordinances it is generally forbidden vessels of any nationality whatever laden with goods that are a monopoly of the State to approach the coasts within cannon range. A decree of August 23, 1846, and then the first section of a circular of April 28, 1849, declare that the expression 'within cannon range' is equivalent to the distance of 3 marine miles (60 to a degree of latitude).

"When customs officers board a ship sailing 'within cannon range' (that is to say, 3 marine miles, 60 to a degree), they ask the captain to show them all the ship's papers and they can take them from him temporarily in certain cases (Circular of the Central Marine Authority of July 29, 1857).

"The ordinance of the minister of finance and of the Austrian minister of commerce of March 23, 1881, and the identical ordinance of the Austro-Hungarian minister of finance of February 20, 1881, on the manifests of cargoes impose the obligation of applying these manifests as a general rule to all vessels coming within 4 marine miles of the customs line (sec. 2).

"Sea fishing is an occupation free to all except in the space within a marine mile from the coast, 'within which only the inhabitants of the coast are authorized to fish' (sec. 1 of the Imperial Ordinance of May 6, 1835). . . .

"It seems that the administrative authorities considered fishing in territorial waters, even outside the marine mile, as reserved to nationals alone. The question has not great importance because the treaties of commerce and navigation concluded with Italy since 1867 sanction the liberal principle. The final protocol of the treaty of December 6, 1891, now in force, is as follows: [See *post*, p. 599.] "

the adjacent State up to a useful distance, which he fixes at nine miles.¹

These considerations of Mr. Gordon bring to mind those presented by Mr. Aubert on the part of Norway at a previous session at Geneva. Mr. Aubert proposed, for similar reasons, to extend the jurisdiction of the adjacent State in the matter of fishing beyond the territorial sea over the part of open sea in such a way that this jurisdiction would apply equally to aliens and nationals; but he proposed as a solution for this desideratum that each State itself fix the limit, or else that it be done by treaties between the interested States.

The other proposition is that of Mr. Haynes, an English sea captain, who has had wide experience with pearl fisheries, and who, like Mr. Gordon, speaks with the authority due to experience. Mr. Haynes notes that there are banks or rocks constituting a danger for navigation which are not uncovered at low tide, but that it is considered among seafaring people the duty of the adjacent State to mark out these spots by a signal beacon. Thus actual practice imposes a duty here which depends upon the depth of the water. Mr. Haynes would concede to the adjacent State a right corresponding to this obligation, and proposes to grant as part of the territorial sea the marginal sea having less than 7 fathoms (12.80 meters) depth. He finally proposes to determine on all maps drawn up by international convention the limits of the territorial sea for all countries. In résumé, the territorial sea would have an extent of 3 miles, but could be extended beyond this distance up to 7 fathoms depth.

Finally, a conference held in November, 1892, in which the land and naval officers belonging to the following Spanish-Portuguese countries took part: Spain, Portugal, Argentina, Mexico, Guatemala, Chile, Costa Rica, Peru, Uruguay, Nicaragua, Honduras,

¹ Mr. Gordon stated his reasons as follows:

"It is not from a purely selfish point of view that Canada claims as large an area of territorial water as possible, but it has now been proved that the inshore waters form to a very great extent the nursery for the young of many of the commercial food fishes; it has also been demonstrated that by means of improved engines for capture, wasteful methods of fishing and fishing at improper seasons, it is possible to deplete the fishery over a large extent of coast line. It is therefore most important that the nation whose citizens own the *fructus* of the territorial waters should, for the purpose of preserving it, have the right to regulate the fishing within the most extended area possible, the term 'regulate' to include power to prohibit absolutely the use of means of capture shown to be injurious to a fishery, and the establishment of close seasons. . . .

"I am strongly of the opinion that in all cases where there is a shore fishery to guard the right to the sole use of that inner territorial belt of the league width should, in order to protect the *fructus* of that league, carry with it the right to regulate the fishery for at least 2 leagues beyond. Nor do I think that this need altogether be by consent of other powers, for surely as a principle it may be accepted that having a certain right within a defined limit should carry with it the power to do what is necessary for the preservation of the *fructus* of that limit to a reasonable extent beyond.

"I therefore am of opinion that whilst only claiming the sole right of fishing in the 3-mile limit, Canada ought to have power to regulate the fishery up to 9 miles from land; this principle being already adopted under the Customs Act for the protection of the revenue."

Bolivia, Salvador, and Santo Domingo adopted a resolution in favor of fixing the zone of territorial sea at a width of 11 kilometers.¹ I do not know whether it is intentionally that the resolution in question mentions a "jurisdictional zone" nor why the number of kilometers is limited to 11.

So far as concerns Article 2, these are all the alternatives which there were to submit to the committee. It will have to choose the system which appears to it most acceptable, taking account of existing circumstances, precedents, and the entire project.

In my first project I proposed to establish the limit of 3 miles.²

Since our meeting at Geneva, this distance has been fixed by an arbitral tribunal as being the *usual* limit of the territorial sea, Baron Courcel, Lord Hannen, Count Viscinti-Venosta, Messrs. Gram, Harlan, Morgan and Sir John Thompson so deciding in the Bering Sea case.

We may certainly say that international usage at the present time inclines toward the limit of 3 miles. If we wished to limit ourselves to establishing international usage, we would have in our favor the entire conventional law of Europe. However, some internal laws differ. England, France,³ and Austria⁴ have adopted 3 miles; Spain fixes it at 6 miles;⁵ Norway at 4 miles,⁶ and Germany does not fix it at all.⁷

Moreover, there is no lack of indications, according to an increasingly general conviction, that the limit of 3 miles is insufficient. This conviction has even proclaimed itself in a British parliamentary committee on fisheries.

This committee, which had been appointed to examine the question "of the measures adopted for the preservation and amelioration of maritime fisheries in the waters which surround the British Isles," came to a conclusion in favor of the extension of the present limit of 3 miles, which it considers as insufficient for the efficacious protection of young fish. Moreover, it proposes this extension for the necessities of fishing exclusively, and asks that it be established by an international arrangement.⁸

¹ See report of Mr. Lehr, *Revue de Droit International*, vol. 25, p. 322.

² I may add to the precedents already cited in this sense that of the treaty concerning the Suez Canal, signed by nine Powers in 1888.

³ See my first report, *Annuaire*, vol. 12, p. 12.

I add an interesting Judicial declaration of the House of Lords made March 28, 1859, to the facts indicating English jurisprudence on this subject: (*Gammell v. Commissioners of Woods and Forests*, 3 Macqueen's Scotch Appeal Cases, p. 419.) Lord Wensleydale said: "It would be hardly possible to extend it (coast fishing) seaward beyond the distance of 3 miles, which by the acknowledged law of nations belongs to the coast of the country, that which is under the dominion of the country by being within cannon range, and so capable of being kept in perpetual possession."

⁴ See *Verordnung der Ministerien des Handels und des Ackerbaues vom 5 Dec., 1884*, § 3.

⁵ See Torres Campos, *Report of the Association*, etc., p. 95.

⁶ See Kleen, *ibid.*, p. 60.

⁷ See Harburger, *ibid.*, p. 73, and Hartmann, *ibid.*, p. 63.

⁸ The passage from the report reads as follows: "Your committee are sensible of the difficulties of making international regulations, but are nevertheless of opinion that the

The report does not say whether the committee agrees with Mr. Gordon that it is advisable to distinguish between the two distances, the one territorial reserved to nationals, like the present one, and the other jurisdictional, open to all nations but under the police power of the adjacent State. It appears to me that the object which it has in view would be equally satisfied by either system. The question here is to put an end to the employment of fishing instruments in waters which are used for the natural breeding of fish. Fishing conducted with steam vessels with trawl nets and extended over a wide range of sea brings about the loss of about nine-tenths of fish too young for the market, which are suffocated by the pressure of one upon the other on the long and rapid passage of the nets. The replies to the interrogatory, with very few exceptions, have been favorable to an extension of the territorial sea, the distances proposed varying between 8 and 10 miles. Some of the persons questioned indicated, however, that while desiring this extension they wished to bring it about by an international convention, which would fix the penalties and the procedure applicable in case of infractions, it being possible to commit some infractions unintentionally at such a distance from the shore. It appears that while in England, foreign fishing vessels seized for infringing fishing rules are punished by fine without personal arrest, in Germany the captain may be arrested, and there are some cases in which the captain thus arrested has been subjected to an imprisonment of a month or six weeks.

The reading of the interrogatories of the specialists published in the "blue book" in question leads to the thought that the efficacious protection of fishing would require the closing of fishing at certain seasons in various parts of the sea¹ and that the extension of the territorial sea beyond the ordinary limits of the present could be ad-

best method for effectively governing the operations of the various classes of fishermen, and, at the same time, for securing, so far as it may be found possible, the proper protection of spawning and immature fish, would be to throw the responsibility of these duties, so far as the waters immediately adjacent to the various countries are concerned, on those various countries; that, for the effective realization of this object, the present territorial limit of 3 miles is insufficient, and that, for fishery purposes alone, this limit should be extended, provided such extension can be effected upon an international basis, and with due regard to the rights and interests of all nations. Your committee would earnestly recommend that a proposition on these lines should be submitted to an international conference of the Powers who border on the North Sea."

¹ See the replies of Mr. Easlemont, president of the Fisheries Council for Scotland before the Committee:

Question. With regard to what you said about the prohibition of trawling within certain areas for a period as much as a month, do you mean prohibition outside the territorial limit?

Answer. Certainly; certain banks or districts of the sea.

Question. Would it be necessary to have an international agreement for that purpose?

Answer. Yes; I should think it would.

Question. Which would you rather advocate before the Committee, endeavoring to get an international agreement for that purpose or endeavoring to get an international agreement for the extension of the territorial limit?

Answer. Both. First, the extension of the territorial limit, and next the power to protect certain waters if the fishing was, in the opinion of this International Convention, of a destructive character. But I think this convention is one that would require very

vantageously accompanied by an agreement to protect the spawn within the ordinary limits of the present time.

We ought not to lose sight of the fact that the reciprocal recognition of a wider territorial sea involves obligations of a corresponding extent in virtue of Articles 5 and 6; the increase of the width of the zone brings about the necessity of exercising police over a wider expanse of sea and maintaining neutrality in case of war between other States; that the wider the distance reserved to nationals is extended, the more frequent and the more difficult to avoid will be the conflicts over fishing, already abundant.

From this point of view the range of cannon is not acceptable. It implies a vast and vague distance of jurisdiction with which no State could desire to charge itself and which, probably, no neighboring States would admit in case of conflict.

The proposition of Mr. Haynes to fix the limit according to the depth, although his reasoning appears absolutely sound, is based for its realization upon a condition which is beyond our labors—the preparation by States of a common maritime map. This solution could well be adopted for certain litigated points by certain States among themselves.

The reasons in favor of a double jurisdiction which Messrs. Aubert and Gordon cite are of undoubted importance. However, the distance of 9 miles proposed by Mr. Gordon as a limit of jurisdiction (we must recall that he would permit foreigners to exercise fishing over these added 6 miles, as there is to-day the right of innocent passage over the 3 miles), appears to me to partake of the exaggeration whose inconvenience I have just noted. It might create embarrassment for the adjacent State and could lead to vexatious occupation and be susceptible of producing conflicts and uncertainty which ought to be caused to disappear.¹

The distance of 6 marine miles would give satisfaction to Spain and to Norway, and appears to be the greatest definite distance which States among themselves appear disposed to claim or to recognize in an effective way.

The tendency among the members of the Committee who answered my circular clearly appears in favor of an extension, and the distance resulting from their recommendations would be that of 5 miles.

close and careful consideration, because it might be possible that the British interests might dominate and we might not be willing to put ourselves in the position of having one vote on an international question of this kind. I think it is not without difficulties; but it would be more advisable to have an area outside the limits to which, by general agreement, the consent of all the Governments interested would be obtained.

¹ It appears that according to an old Scotch custom, the distance that one could see from the coast in ordinary weather was considered territorial. The distance that one can see at sea varies considerably. When the weather is very clear we can, for example, see Calais from Dover. In ordinary weather we can only see about one-half this distance, that is, about 10 miles. This applies to the North Sea; in other climates noticeable differences must exist.

It appears to me personally that we ought, if we are disposed to extend it to 5 miles, to advance 1 more mile and thus incorporate into one group the entire existing practice, to fix once and for all the European limit of to-day demanded by some and adopted by others as a rule sanctioned by our examination of the circumstances and facts and by the reason of things.

The adoption of a distance greater than the 3 customary miles does not, however, appear to be considered as obligatory for States which by their municipal laws or treaties would claim less.

I therefore propose the distance of 6 miles, but in conformity with a reservation whose necessity I have just indicated, I inserted in the preamble a consideration which would confirm to States the right of maintaining the limit of minimum distance which they might prefer.

As to the reservation in favor of a zone wider than a continuous and established usage shall have sanctioned, Mr. Kleen, while fearing the inconvenience of this amendment, proposes, however, to maintain the principle for exceptional cases, and above all if the project does not accord a sufficient protection to all justified interests.

Since I now propose the limit which appears to be the distance farthest from the coast over which States appear to seek to claim the exercise of sovereignty, there is no longer any reason for inserting a reservation for exceptions of fact which no longer exist. Our honorable colleague, it appears to me, ought likewise to be of this opinion. I consequently reject the reservation in question.

3. For bays the width of ——— is measured from a straight line across the bay at the part nearest the entrance, where the distance between the two shores of the bay is double the extent fixed as that of the territorial sea.

Mr. AUBERT finds that this article ought to contain a reservation similar to that in Article 2. He goes further and even proposes that the adjacent State be permitted to fix the limit in detail, according to the local configuration and according to the practical needs.

We have seen at the end of my remarks on Article 2 what my motives were for the suppression of the reservation in question; and, so far as unilaterally fixing the limit in detail according to the local configuration, it appears to me that our object is to regulate precisely by the application of principles a matter which heretofore has been more or less regulated in this fashion.

My first reading must, however, be considerably altered. The sketch between parentheses no longer renders my thought. The imaginary line across the bay which continues, so to speak, the low-water mark and from which the territorial sea is measured need not be double the limit of the territorial sea. I am even of opinion that for such bays the system applied in Western Australia may well be justified; that is, to consider as territorial sea every bay

of which one promontory may be seen from the other. It is certain that such bays come within the intimacy of the internal life of the adjacent State. Nevertheless, it is advantageous to make an exact delimitation. Sir Travers Twiss causes me to remark apropos of the limit of 3 miles that this distance is to be measured among the islands of the Antilles and on the coast of Spain. It is certain that a fixed distance is more easy to apply than the system of Western Australia, but that does not prevent us from adopting a system which is practical and rational. Now, the distance of 10 miles most ordinarily adopted appears to be that at which one may easily see one headland from the other.

I propose, consequently, to adopt the distance of 10 miles, which with the 6 miles of territorial sea added, appears amply sufficient.¹ I insert in this article the reservation which I suppressed in Article 2. This reservation has here a different extent than in that article. Bays do not, in general, serve for navigation between other than the adjacent States. They are placed at the headlands outside of

¹ Mr. J. B. Moore gives the following reasons for the adoption of the limit of 10 miles :

Since you observe that there does not appear to be any convincing reason to prefer the 10 miles in such a case to that of double 3 miles, I may say that there have been supposed to exist reasons both of convenience and of safety. The 10-mile line has been adopted in the cases referred to, as I understand them, as a practical rule. The transgression of an encroachment upon territorial waters by fishing vessels is generally a grave offense, involving in many instances the forfeiture of the offending vessel and it is obvious that the narrower the space in which it is permissible to fish the more likely the offense is to be committed. In order therefore that fishing may be both practicable and safe and not constantly attended with the risk of violating territorial waters, it has been thought to be expedient not to allow it where the extent of free waters, between the 3-mile line drawn on each side of the bay, is less than 4 miles. This is the reason of the 10-mile line. Its intention is not to hamper or restrict the right to fish, but to render its exercise practicable and safe. When fishermen fall in with a shoal of fish, the impulse to follow it is so strong as to make the possibility of transgression very serious within narrow limits of free waters. Hence, it has been deemed wiser to exclude them from space less than 4 miles each way from the forbidden lines. In spaces less than this operations are not only hazardous, but so circumscribed as to render them of little practical value.

I recall the observations of Mr. Aubert on the subject of the mouths of fiords :

Norway, like Sweden, was invited to adhere to the treaty of 1882 on fishing in the North Sea, but could not adhere to it, first, because the distance stipulated was in general too small (3 geographical miles of 60 to a degree) ; finally, and above all, because the maximum width of the mouths of the fiords (10 miles or 2½ geographical leagues) was too narrow, for in Norway the mouths of the fiords belonging to this category are incomparably more numerous than in the States which have adhered to the above-mentioned treaty. Another essential question is to establish whether, in determining the territorial sea—an abstraction made for gulfs, properly so called—it is necessary to follow the capricious sinuosities which the coasts or line of islands form. As that would be quite impracticable, the Government has fixed in certain important cases how the line which serves as the base ought to be drawn. On these occasions a practical frontier had to be found and a line drawn between points which were visible from the open sea. That is why the basis of the territorial sea has at times in Norway become more extended than the rules of the treaty of 1882 established, and which, moreover, as I have already said, Norway has not adhered to. It is also undoubtedly impossible to submit geographical relations of this nature to general rules of an absolute character. It is necessary to leave the detailed application of them to custom and the regulation of each State, provided that is done in good faith or is dictated by plausible reasons. The general international rule to be established ought consequently to be elastic enough to permit such local anomalies. (*Annuaire*, vol. 11, p. 141.)

the course of the high seas and separated from it by a line definitely determined. Now there are many bays which are more than 10 miles, and even 16 miles, wide, and which, by their situation, are necessarily placed under the absolute sovereignty of the adjacent State. This is the case with the Scotch firths and the bay of Cancale, whose width is 17 miles; the bay of Chaleur, in Canada, 16 miles wide; all these bays are considered as being under the exclusive domination of the adjacent State.

We must finally establish that a bay is in a different situation from the territorial sea properly so called.

I likewise propose to assimilate to rivers the waters inside of an imaginary line drawn between headlands. The right of passage has no *raison d'être* there. The right of passage not existing, these waters are national without reserve. It is, moreover, in conformity with the whole project that the waters inside of a line drawn as a continuation of low-water mark shall be considered as territorial. . . .

[The discussion of Mr. Barclay's report in plenary session of the Institute took place March 28, 29, and 31, 1894, as set forth in the following extracts from the minutes:]

Meeting of March 28 (morning).

Page 283.—The assembly passes to the discussion of the articles of the draft.

Article 1.—The State owning the shore is sovereign over a zone of the sea washing it, subject to the right of innocent passage reserved in Article 7.

This zone bears the name of territorial sea.

Mr. VON BAR deems that there can not be over the sea, which is a movable and unstable element, the same right of sovereignty as over the land, the more so as one may be forced to penetrate into the territorial sea, whilst one can never be forced to enter into a territory. Consequently he proposes an amendment, according to which, on the one hand, the right of a State over the territorial sea would be assured, without the nature of this right being determined, and, on the other hand, divers special rights (of legislation, fishing, and commerce), included within this general right, would be enumerated.

Mr. DESJARDINS is of an absolutely opposite opinion. It is advisable to indicate the right of a State over the territorial sea; whether it is a right of property or sovereignty is a controverted question, but it is of practical importance, for certain governmental declarations have admitted the right of property. The committee, as is proved by the moving considerations for the project, admits, with reason, the right of sovereignty.

Mr. DE MONTLUC agrees with these observations, but rejects the assimilation between the right of customs and the general right over the territorial sea.

Mr. BARCLAY fears the danger of enumerations, always incomplete.

Mr. KLEEN would like to have the vote on Article 1 deferred until after the consideration of Article 7, the object of which is reserved in Article 1.

The PRESIDENT (Mr. Renault) divides the two questions into two distinct subjects for vote, first, the right of sovereignty, and, second, the right of passage.

Mr. A. ROLIN proposes to amend the wording, and gives Article 1 the following tenor: "The State is sovereign over a zone of the sea which washes the coast."

Mr. LAMMASCH supports the amendment of Mr. von Bar and desires that the duties of the State be considered as well as its rights, and that an enumeration of both be made in Article 1.

Mr. DESJARDINS considers an enumeration of the elements composing sovereignty impossible. On the other hand, the duties of a State are evident, but can not be either fixed or enumerated.

Mr. MARTENS is equally opposed to the amendment of Mr. von Bar. As soon as any right is recognized on the part of the State it can only be the right of sovereignty. The cannon shot, which everybody accepts, is a sufficiently forceful manifestation of the sovereignty of a State. As to duties they do not always exist, whilst the right exists in all cases.

Mr. VON BAR insists upon the difference which exists between sovereignty over the sea and sovereignty of the State over its territory.

Mr. DE MONTLUC would leave to civil law the correlation between rights and duties. There is no obligation with respect to the air or to the water of the sea. There is a sovereignty over the great rivers, over the large lakes, over the glaciers of the Alps, and over the deserts of Africa. There are rights there, but not duties.

Mr. HARTMANN does not admit two different sovereignties. The State may exercise possession on the sea as on the land. It has the *corpus*, represented by cannon and the *animus* represented by its will.

Mr. LAMMASCH replying to the argument of Mr. de Montluc, says that the right of sovereignty is exercised over vessels and over persons and not over the waters, nor can the two kinds of sovereignty be confused. Access to glaciers and the passage across deserts may be prevented but entrance into the territorial sea can not always be prevented.

The first paragraph of Article 1 is adopted by a large majority in this form:

The State is sovereign over a zone of the sea which washes the coast.

Paragraph 2. *This zone bears the name of territorial sea*, suggests to Mr. ENGELHARDT the observation that the term "territorial

sea" is not acceptable because it expresses two incompatible ideas. It suggests closed seas, and ought to be replaced by the term "littoral sea."

To this observation the PRESIDENT opposes constant usage, which has made the term "territorial sea" an established expression.

After a statement by Mr. MARTENS that he himself has had to renounce the distinction between "territorial sea" and "littoral sea," because of confusion, Mr. ENGELHARDT declares himself satisfied.

Paragraph 2 is adopted.

Meeting of March 28 (afternoon).

Article 2, paragraph 1.—The zone of territorial sea extends 6 marine miles (60 to a degree of latitude) from low-water mark along the full extent of the coasts.

Mr. BARCLAY, the reporter, explains that in the project of Geneva the precise extent of the territorial sea had been left blank. Since then this void has been filled. It has been established that the ordinary limit of 3 marine miles appeared insufficient, and that the actual tendency is to increase the extent of the territorial sea. As a means, the distance of 6 marine miles appeared as possible of adoption.

Mr. DE MONTLUC approves the limit indicated. In Germany, undoubtedly, certain authorities admit that the point of departure for the measurement of the territorial sea should be high-water mark, since batteries are placed at that point. Perhaps this view is exact, but Mr. de Montluc does not insist upon it, nor does he any longer insist upon the objection which he first made to the wording of the Committee, which was based upon a more exact determination of the tides, which would serve to fix the extent of the territorial sea. It is important, indeed, to establish whether we are to take account of the ordinary tides or extraordinary tides. In view of the Ecrehous, the adoption of a definite tide as a point of departure might lead to a difference of 10 kilometers in the extent of the territorial sea. But it is understood that account shall be taken of ordinary tides only, and Mr. de Montluc adheres to the wording proposed.

Mr. DESJARDINS agrees with this view.

Article 2, paragraph 2.—In case a State seeks to subject fishing to any regulations to a distance greater than 6 miles from the shore, the consent of interested States is necessary.

Mr. BARCLAY explains that the reservation in the second paragraph of the article, of a power of extension of the territorial sea in the matter of fishing, has been inserted in the project on the request of Mr. Aubert, who, by the aid of maps, has shown that the general limit fixed by the project would be insufficient in several places for the

North Sea. As it would be impracticable to enter into the details of each part of the coast, it appeared preferable to reserve to the interested States the power of extension of the territorial sea. Such was the origin of paragraph 2 of Article 2.

Mr. AUBERT explains by the aid of maps the reasons which militate in favor of a wider extension to be ascribed to the territorial sea in the matter of fishing. According as the number of fish in the North Sea becomes smaller, it is necessary, in order to operate a profitable fishing industry, to go farther and farther out from the shore. Since it is established that the nature of the bottom of the sea permits of the employment for the capture of the fish of destructive instruments of considerable power, like trawl nets, it is advisable in the matter of fishing to be able to extend to 10 miles the limit of the territorial sea, so that within it may be comprised the nurseries. Mr. Aubert, moreover, recognizes that the extension of the territorial sea to 6 miles would constitute great progress upon the actual state of things, but it is well to recognize that in spite of this eventual extension of the territorial sea to 10 miles, there would remain large banks situated outside these limits, where fishing by aliens would still be very profitable. This would be the case in Norway, and especially in Iceland, where the line of fishing banks is very uncertain. It is within the role of the Institute to leave to poor and small countries the means of struggling against other States.

Mr. STRISOWER proposes the suppression of paragraph 2. It is superfluous and even dangerous to permit States to augment the extent of the territorial sea in the matter of fishing, because they possess the same faculty in other respects. It would be best that the Institute express the wish that States agree among themselves on the regulation of fishing in the open sea.

Mr. MARTENS remarks that especially in matters of international law principles have at times been regarded as habitual and constant, which, when considered from all sides, show that they really do not rest upon any positive grant. Such is the limit of 3 marine miles, which is ordinarily found indicated in books as being supported upon an incontestable principle. Now, there is nothing like this. The only basis is that indicated by Bynkershoek *terrae potestas finitur ubi finitur armorum vis*. Undoubtedly the Institute, for the purpose of giving more complete satisfaction to the exigencies of international life, ought to determine precisely the limits of the territorial sea, and it would not be sufficient to indicate merely as the line of demarcation a range of cannon shot; but a distance of 6 miles is not sufficient, in view of the actual tendencies. The arbitral commission in the Bering Sea case fixed at 60 miles the extent within which British and American ships shall be subject to

certain special conditions for the fishing of seals. This regulation, laid down by the arbitral tribunal for the two litigating States, will not have a practical significance unless the other interested Powers, Japan and Russia, adhere to it. In the same order of ideas may be cited the agreement concluded in 1893 between Great Britain and Russia, which has just recently been renewed. This agreement, also relating to seal fisheries, recognizes around the Russian islands of the Pacific a zone of protection of 30 miles, and along the Russian coasts of the Pacific a zone of 10 miles.

Based upon precedent and upon the rule early formulated by Bynkershoek, Mr. Martens proposed an amendment as follows:

The zone of territorial sea extends 10 marine miles (60 to a degree of latitude) from low-water mark along the full extent of the coasts.

Although Mr. DEN BEER POORTUGAEL, like Mr. Martens, thinks that the range of cannon shot is the inspiratory idea which ought to dictate the solution of the question to the Institute, he does not believe that the proposition of Mr. Martens ought to be adopted. When the extent of the territorial sea is, in fact, determined we ought not to take account of the bombs which may lose themselves in the distance, but merely of the line of respect which actually effective cannon shot determines; since, moreover, if the extent of territorial sea were carried to 10 miles, we would thus augment the importance of the duties which fall to the adjacent States. In view of these conditions, a limit of 6 miles is sufficient.

Mr. BARCLAY recalls that the considerations which inspired the vote of certain members of the Committee is not that upon which Mr. den Beer Poortugael bases himself. The vote of certain members of the Committee is explained by the idea of a compromise between different proposed limits. He does not contest, moreover, the importance of the precedent relative to the special relations existing between Great Britain and Russia, cited by Mr. Martens, but in the matter of the Bering Sea arbitration we must not forget that the members of the tribunal did not have an absolutely free hand, since they had to deal with two propositions, one that of the United States which consisted in subjecting the entire extent of the Bering Sea to their own control, and the other that of Great Britain of creating a zone of 20 miles along the coasts of the islands of the Bering Sea. It is therefore an idea of compromise which inspired the members of the arbitral tribunal.

Mr. MARTENS declares that the reply of the reporter does not destroy the force of the precedents cited by him. In the matter of the Bering Sea arbitration, the historical origin of the admitted solution does not destroy the argument which it is possible to draw from

the precedent invoked by him. He asks the roll call on his amendment. The votes ranged themselves as follows—10 aye, 25 no; 4 not voting.

The ayes were: Messrs. Aubert, Beauchet, Hall, Kleen, Lehr, Martens, Matzen, Stoerk, Waxel, Westlake.

The noes were: Messrs. von Bar, Barclay, den Beer Poortugael, Lammasch, Leech, Lyon-Caen, von Martitz, Meili, de Montluc, Moynier, Perels, Pradier-Fodéré, Lord Reay, Renault, Albéric Rolin, Edouard Rolin, Strisower, Torres Campos, Weiss, Wallace.

Not voting: Clunet, Féraud-Giraud, Lainé, Roguin.

The text of the Committee was then put to a vote and adopted.

The discussion then opens on Article 2, section 2, the text of which has been reproduced above.

Mr. DESJARDINS finds the wording of this paragraph dangerous; for in view of the fact that the importance which the eventual extension of the territorial sea might have is not precisely fixed, it may be feared that two States would agree to extend it unduly and would thus reestablish the theory of *mare clausum*. Nor is it well understood what we mean by interested States, for the reason that such extension of territorial sea might be considered as interesting all civilized peoples.

Mr. BARCLAY explains that to the mind of the Committee this possible extension of the territorial sea ought not to be greater than 4 miles; that, moreover, the agreements in question could only bind the States which concluded them.

In the opinion of Messrs. STRISOWER and DE MONTLUC the second paragraph is dangerous and useless.

Mr. FÉRAUD-GIRAUD deems that the notion of interest is in itself very variable, since such a State without actual interest over a given extent of sea might ultimately, as a result of circumstances, acquire an interest over that same extent of sea. Thus, to safeguard the respect for these interests, he proposes to word paragraph 2 as follows: "In case States agree on fixing upon a greater distance, this derogation shall only be obligatory upon the States adhering to it."

After a short discussion, paragraph 2 of Article 2, whose maintenance no one seems to demand, is put to vote and rejected.

Article 3.—For bays, the territorial sea follows the sinuosities of the coast, except that it is measured from a straight line, drawn across the bay at the place nearest the opening toward the sea where the distance between the two sides of the bay is 10 marine miles in width, unless a continued usage of long standing has sanctioned a greater breadth.

The right of passage mentioned below does not apply to waters landward of this line.

Mr. BARCLAY explains that the Committee agreed upon the figure of 10 miles. That is, a distance at which from one shore the other may be seen. This figure is generally adopted.

Mr. E. ROLIN proposed 12 instead of 10 miles. It is double the 6 miles proposed for the territorial sea and on that account more within the logic of the project. This would make the point of departure of the territorial sea the point of the bay which may be effectively protected by cannon shot.

Messrs. AUBERT, DEN BEER POORTUGAEL, MARTENS, and PERELS support the figures of 12 miles.

Mr. BARCLAY opposes it as contrary to all precedents. The distance between the headlands of a bay has no relation to the width of the zone fixed for the territorial sea, the line drawn across the bay between the headlands being a continuation of low-water mark. The distance of 10 miles has been most generally adopted, undoubtedly for the reason that in ordinary weather it is possible at this distance easily to distinguish one headland from the other. He prefers this limit, if only to show that no relation exists between the two distances, which are justified by different motives.

On the vote the figure of 12 miles was adopted by a large majority, and the first part of the article was likewise adopted.

Mr. KLEEN proposes to reserve the second paragraph of the article for discussion at the same time as the right of passage.

This was adopted.

Article 4.—Sand banks and rocks exposed at low tide are assimilated to the territory.

Mr. VON BAR finds this article dangerous if it is taken literally. There might be series of sand banks; the territorial sea would extend on indefinitely and the free sea would disappear. The speaker proposes to omit the article.

The REPORTER is against that. Sand banks constitute a danger to navigation. If States are allowed to appropriate them the danger will be lessened, because the States will take precaution to reveal their existence.

Mr. DE MONTLUC had proposed to the committee to establish a small zone of a mile around the rocks for the sake of protection.

Mr. BARCLAY. The committee did not accept that proposal, because of the difficulty there would be in fixing the line between islands with a small zone and those with a large zone.

Mr. STRISOWER says that in the Austrian law the reckoning is taken from the coast for the regulation of fishing.

Mr. A. ROLIN thinks that Article 4 is contrary to the basis of the project, for these sand banks can not be considered as places that can be protected in a permanent way. Besides, it has no interest from

the point of view of navigation, for States appropriating them would persist in keeping them, since they would augment their territory.

On the vote Article 4 is rejected by 15 to 13.

Mr. MARTENS remarks that he voted in favor of the article because certain rocks are outside the scope of any protection.

Article 4 (formerly Article 5).—Whatever be their width, the mouths of rivers that are navigable and entirely national are assimilated to the rivers themselves.

Mr. RENAULT is surprised at this assertion concerning navigable rivers; it seems to exclude unnavigable rivers, to which the article is nevertheless applicable *a fortiori*.

Mr. DE MONTLUC proposes the omission of the word "navigable."

Mr. HARTMANN asks where the line between the mouth of the river and the river itself will be found. In certain cases that might be very difficult. It would be necessary to have a line drawn for each river.

The PRESIDENT. The remark of Mr. Hartmann is very much to the point. The question is important also from the viewpoint of domestic legislation; for the laws governing rivers and the sea are not the same.

Mr. DE MONTLUC cites a decree of the Court of Angers, adopting as a criterion that in order for there to be a river there must be "an approximate parallelism of the banks." But this is a very delicate question for certain rivers; a general rule can not be given.

Mr. STRISOWER remarks that international rivers are not provided for in this article.

Mr. VON BAR answers that there are treaties for all rivers of that class.

Mr. ENGELHARDT finds a difficulty in the article. It lays down a rule for rivers that are wholly national; it might be inferred that this rule is not applicable to rivers belonging successively to several nations. He thinks that the committee meant that the mouths of national rivers can be closed but not those of international ones. The wording is defective.

Mr. WESTLAKE proposes to omit the article. As the distance of 12 miles has been voted for bays, river mouths will be assimilated to bays. Very few rivers have wider mouths. Let us take, for example, the Amazon. If Brazil has more extensive rights over its mouth owing to continuous and established usage, these rights will be safeguarded by Article 3. If, on the contrary, such rights do not exist, there is no reason for not assimilating so large a river mouth to the high sea.

Mr. DESJARDINS does not think that river mouths should be classed with bays.

Messrs. ENGELHARDT, CLUNET, E. ROLIN, and BARCLAY make the following amendment: "The mouths of rivers, whatever be their width, are assimilated to the rivers themselves."

Mr. ASSER supports the view of Mr. Westlake. The terms of the amendment are too general. It can not be said that all rules in force in the course of a river are applicable to its mouth.

Mr. BEAUCHET supports Mr. Westlake. The article must either be omitted or the mouth must be assimilated to the river.

Mr. STRISOWER makes the following amendment: "Mouths of rivers, whatever be their width, are not subject to the régime of the territorial sea."

Mr. PERELS favors the omission of the article. The question is one of regulating the territorial sea and not rivers.

Mr. BEAUCHET opposes the amendment. The Institute should state principles and not negations.

Mr. E. ROLIN asks if the word "mouth" is well defined. For him it is a simple line: that where the river ends and the sea begins. Now a simple line can not be subjected to a particular régime. The article is superfluous.

Mr. DESJARDINS thinks that the project should say what is and what is not the territorial sea.

Mr. MARTENS is in favor of omitting the article, which it would be impossible to make agree, for example, with all the treaties passed on the subject of the Danube since 1856.

Mr. BARCLAY declares that if the article is omitted the territorial sea will be fixed for river mouths as for bays.

The article is rejected by a large majority.

Article 4 (old Article 6).—1. The use made of the open sea in time of war as in time of peace shall be such as not to prejudice the enjoyment of the territorial sea by subjects of littoral States.

2. In case of war between foreign States, the part of the sea within cannon range of the coasts is neutral. The littoral State has a right to limit its neutral zone to 6 marine miles from the coast by a notification to this effect.

3. The neutral State, on its part, is bound to see to it that the territorial sea does not serve as a base of operations of war or any enterprises on the part of one belligerent against another.

The PRESIDENT thinks that before discussing the sections of this article, the Institute should decide whether there is to be a uniform zone or a different zone in time of peace and in time of war. This is the dominating thought of the article.

Mr. MARTENS thinks the article not clear. He does not know what the three points mean.

Mr. BARCLAY explains that the article is the consequence of the meaning given to the expression "territorial sea." The zone of

neutrality must be of greater extent than the territorial sea; it should answer to the range of cannon.

According to Mr. DESJARDINS, the main question is to know whether a neutral zone is to be permitted outside of the territorial sea.

Mr. E. ROLIN is opposed to a neutral zone. Mr. den Beer Poortugael indeed recognized that the effective protection that can be exercised stops at 6 miles. It must not be forgotten that neutrals are obliged to cause their neutrality to be respected; they can not be bound beyond the distance from the coast that they can efficaciously guard. Mr. E. Rolin proposes consequently to assimilate the neutral zone to the territorial sea. He thinks that the article is dangerous for belligerents.

Mr. VON BAR asks for the omission of paragraph 1, which lays down a rule concerning the open sea and not the territorial sea. This rule will prevent belligerents from fighting within a zone of 6 miles reckoning from the limit of the territorial sea, and thus will double the extent of the territorial sea.

The PRESIDENT thinks that the first question to settle is whether there is to be a neutral zone outside of the zone of 6 miles.

Mr. DEN BEER POORTUGAEL supports the proposition of Mr. E. Rolin.

Mr. DESJARDINS is, on the contrary, of opinion that there should be a neutral zone extending to the longest range of coast batteries. The idea of Mr. Rolin is tempting at first sight; but how will it work in practice?

Mr. AUBERT does not understand how 6 miles will give satisfaction while the range of modern cannon is 23 kilometers. The coast would not be defended.

Mr. MARTENS. In extending the neutral zone we restrict military operations; this is in conformity with the ideals of peace.

Continuance of the discussion is postponed to the next day.

Meeting of March 29, 1894 (morning).

On the reading of the minutes of the meeting of March 28, Mr. DEN BEER POORTUGAEL says that if he declared against the enlargement of the territorial belt it is in order not to increase the duties of neutrals.

Mr. MARTENS desires it well understood, apropos of the rejected Article 4, that steep rocks and islets that are never submerged are assimilated to the territory.

Mr. DESJARDINS asks if such was indeed the thought of the assembly, if it understood, for example, that a new zone of 6 miles begins from a rock that is itself situated 5 miles from the coast.

Mr. DE MONTLUC declares that if he voted nay it is because he thought that the committee had gone too far in proposing 6 miles.

Mr. PRADIER-FODÉRE fears that too many articles are being omitted; he thinks that a solid work to influence governments can not be made in that way. A more matured discussion is needed, one that is more coordinated. Amendments have been multiplied too much. He proposes postponement to another session.

This proposal is rejected by a large majority.

The assembly resumes discussion of Article 4, old Article 6, begun in the meeting of March 28.

Mr. DESJARDINS considers as very important the question of a neutral zone of greater extent than the territorial zone. In his opinion the text of the committee is not good and should be modified. The committee made a mistake, after having laid down a general principle, that of a territorial zone, in seeming to abandon this principle and laying down another one for time of war. Without having consulted together, Mr. Perels and the speaker have come to the same result, and Mr. Desjardins will propose to the assembly to vote the text of Mr. Perels which he supports and will presently read.

On the other hand, Mr. E. Rolin has too absolute a system. He wishes to identify the territorial sea and the neutral zone. The Institute has voted the distance of 6 miles for the first; a simple idea follows: since this rule of 6 miles is a good one let us apply it to everything. But how dangerous this system would be! We must not forget that here we are not in a field of pure reasoning. In order to accomplish something practical accepted usages must be taken into account. Now States have adopted different distances; in England the zone for customs is 9 miles; in France, 2 myriameters; and likewise for quarantine. Moreover, it is unanimously admitted that two or more States may increase this distance of 3 miles because to a certain degree they can extend their protection farther. There is therefore no uniformity. There are necessities flowing from the nature of things. In 1884 Mr. Perels already stated that the means of defense on the coast operated for 8 miles. To-day this distance must be increased with the range of cannon. This must be taken into account, for the neutral can not be prevented from defending himself.

Mr. DESJARDINS cites some examples: A naval fight takes place 7 miles from a neutral coast, the projectiles reach the shore; is it to be supposed that the neutral has not a right to force them to go farther off, that he will let his buildings be destroyed? Such a concession will never be drawn from a State. Another example: An enemy ship pursues a neutral ship up to 7 miles from a fortress of such neutral; is it believable that regulations can prevent that fortress from defending its ship if it thinks it can save it? And so for the right of

visit; a nation will never permit its ships to be searched 7 miles from its coast when they are actually under the protection of the guns on such coast—Mr. Perels, moreover, cites in his book a case where the Senate of the free town of Lubeck passed a very emphatic ordinance intended to protect its ships.

For all these reasons Mr. Desjardins thinks that the proposal of Mr. E. Rolin is inadmissible. He reads the text proposed by Mr. Perels and himself, which is as follows:

In case of war, a neutral littoral State has the right to extend, by declaration of neutrality or by special notification, the zone fixed by Article 2 up to the range of coast artillery so far as concerns its neutrality.

With this text the principle of 6 miles of territorial sea will be maintained. The neutral zone will continue to be confused with the territorial sea; but, if the neutral wishes to assume the more important obligations to protect himself, he is free to do so. A duty is not imposed upon him, he is given a right, he is permitted to defend himself.

According to Mr. HALL, the discussion has been embarrassed by the decision of fixing the neutral zone at gun range. It is necessary to base it on different principles. There is no practical relation between gun range and the means of causing neutrality to be respected. Artillery can not be placed along the entire extent of coasts. The real sanction of neutrality is the checking of attacks that are made there.

It is evident, on the other hand, that the 6-mile zone is not sufficient. Mr. Hall cites several examples—*inter alia*, the bay of Portland, several points on the coast of Canada—places where it would be dangerous because of currents or winds to anchor less than 6 miles from the coast. Ships forced to seek a refuge would expose themselves to shipwreck. An arbitrary limit is therefore preferable to gun range; Mr. Hall proposes to fix this limit at 10 miles.

The PRESIDENT reads a letter from Mr. Holland, who is prevented from being present at the meeting, in which he declares for two distances; his only hesitation proceeds from his reluctance to increase the duties of neutrals.

Replying to Mr. Desjardins, Mr. E. ROLIN declares that he supports the amendment of Mr. Perels accepted by Mr. Desjardins and the reporter. He desires nevertheless to add a few words in order to define his thought, which seems not to have been perfectly understood. It is not, indeed, a question of abstract logic that has influenced him. What struck him was the concurrent interest of the neutral and the belligerent that seemed to him compromised by Article 6 of the project as it was worded; the interest of the belligerent that he should be informed in a direct manner before the war of the

extent of the territorial sea in a fashion to enable him to make the plans of his campaign; the interest of the neutral because the project seemed to place him in the alternative of being unable to protect his neutrality beyond the circumscribed zone of 6 miles or of having the serious responsibility of seeing that his neutrality is respected throughout the entire extent of the neutral zone.

Along this line Mr. Rolin intended to file an amendment to word Article 6 as follows: "In case of war between foreign States the sea is neutral for the distance of cannon shot from the coasts of the neutral States," and also mentioning expressly that "the obligations of the neutral to cause his neutrality to be respected is applicable only to the territorial sea properly so-called and not to the neutral zone." The simplest thing that could have been done would be to abstain entirely from speaking of these questions of neutrality in regulations of the territorial sea. But it results from the information that Mr. Rolin has obtained from the reporter that the third section of Article 6 and the obligation to enforce respect for neutrality, in the view of the committee, apply only to the territorial sea properly so-called up to 6 miles, that is, over the zone where the littoral neutral can exercise effective control from the coast. In these circumstances the objections of Mr. Rolin disappear, at least as regards the interest of the neutral, and that is why he supports the Perels amendment which seems to him preferable in any case to the original text of Article 6.

Mr. ROLIN will add but a single word to reply to one of the examples cited by Mr. Desjardins; he himself can not admit, as to the extent of the territorial sea, that belligerents may use the open sea in such a way as to cast projectiles upon the territory of a neighboring neutral, nor even into the territorial sea where the neutral is sovereign.

According to Mr. KLEEN it is important to emphasize the point that it is impossible to have a single fixed limit. There must be two of them for neutrality. He has already expressed this opinion two years earlier in a book on the subject. This is in the nature of things. While rights of customs, questions of fishing, of quarantine, flow from the same principle, which may be laid down in advance, neutrality is of quite another nature; it is not merely unknown, it is incalculable; it may change as guns are developed; what will be protected to-day may very likely not be to-morrow. For these reasons it seems to him impossible to permit a fixed limit, and he declares himself in favor of the amendement of Mr. Perels and opposed to that of Mr. Hall.

Mr. DEN BEER POORTUGAEL takes the same view as Mr. Desjardins. He thinks, however, that the latter has gone a little too far in speak-

ing of a naval fight discharging projectiles upon neutral territory; that can not take place because of the line of division, which is eighteen kilometers. For Mr. den Beer Poortugael the danger lies in increasing the responsibilities of neutral States.

Mr. FÉRAUD-GIRAUD thinks that there are numerous difficulties here. The Institute set out with the principle that to satisfy all interests a fixed system was necessary. Mr. Féraud-Giraud fears that a mistake was made in trying to satisfy everybody and satisfying nobody. But this principle was adopted; why dismiss it now? The range of cannon means nothing; certain peoples profit by progress, others do not; this is not in harmony with the project as a whole. Mr. Féraud-Giraud proposes to vote only for section 1 of Article 4 and to reject the two others.

Mr. DESJARDINS thinks that this question of the neutral zone must be dealt with.

For Mr. MARTENS this discussion has been very interesting; but not entirely clear. If a single zone of 10 miles had been adopted, everybody would doubtless be satisfied. As that was not done he supports the proposal of Mr. Perels, which takes some account of existing practice. Before a war, indeed, neutrals have always taken care to notify to belligerents the zone that they wished to see respected.

Mr. BARCLAY answers that the committee studied this question at length; it had several projects to examine. If it refrained from fixing a limit, it is because it found that that created difficulties, not for the rights but for the obligations of neutrals.

The discussion is closed on this point. The assembly decides to vote first on the amendment of Mr. Hall. This amendment is negatived by 19 votes to 11.

The amendment of Mr. PERELS, supported by the committee, is then adopted by a very great majority.

After some remarks it is decided that this amendment be substituted for the entire Article 6 of the committee's project, and that it become Article 4.

Article 5, paragraph 1.—All ships without distinction have the right of innocent passage through the territorial sea.

Mr. KLEEN would greatly regret having this wording adopted; he finds it inexact in theory, useless and very menacing in case of war. To his mind a State is sovereign or it is not sovereign. A State may prevent the performance of an act upon its territory; it ought to be in a position to do so also upon the territorial sea. A State has the right to determine according to its domestic legislation whether or not there shall be places of refuge or asylum on its territory; likewise it ought to be able to regulate passage in its territorial waters; it may be believed, too, that it will not act lightly.

The proposed text would also present very great dangers. It is necessary to avoid, in the resolutions of the Institute, expressions with double meaning as would be the case with the word "innocent"; history shows that what is innocent at the time may no longer be so a moment later; for what is innocent for the actor can not be so for the other party. On the other hand if the legality of innocent passage is admitted, how shall we distinguish anchoring which is unanimously considered as something that can be forbidden? In these conditions Mr. Kleen offers three successive and alternative proposals. According to the first, paragraph 1 of Article 5 would be simply omitted.

The second would add "in time of peace" at the end of the committee's text.

According to the third, this paragraph would be worded as follows: "All ships, except warships of belligerents in case of war, have the right of innocent passage through the territorial sea."

Mr. BARCLAY asks that paragraph 1 of Article 5 of the committee's draft be retained; it was approved unanimously by the committee.

The right of sovereignty on the sea is not absolutely the same as that over the land; it is a purely imaginary line separating the territorial sea from the high sea, and it is impossible to prevent it from being crossed at least in certain particular cases, as, for example, in case of accidents at sea. The right of passage is therefore a servitude, unanimously allowed by the law of nations.

Mr. FÉRAUD-GIRAUD shares the view of Mr. Barclay. For greater clearness it would be well to distinguish between time of war and time of peace; but in time of peace it is impossible not to accord the right of passage. In the Mediterranean, for example, the greater part of navigation takes place in the territorial sea; the freedom of commerce wants the right of passage recognized.

For Mr. DESJARDINS the committee's text should be voted, as in Article 1 of the draft the right of the littoral State over the territorial sea has been defined as sovereignty; if the first paragraph of Article 5 were not adopted, it might be feared that certain States would abuse the definition given the right that they exercise over the territorial sea.

The text of the committee was then voted on after the President had first declared that this vote, if affirmative, would not prevent later amendment by one or other of the changes proposed by Mr. Kleen.

The wording of the committee is adopted by 22 votes against 8.

The first proposal of Mr. KLEEN thus being disposed of, a vote is taken on the motion to add the words "in time of peace" at the end of the committee's text. This amendment is adopted by 18 votes against 16.

The question then arises of determining whether it is necessary for the assembly to vote on the whole of the proposition thus amended.

Mr. PERELS offers a draft generally modifying all of the Article 5.

The PRESIDENT remarks that this proposal, in its first part, bears on the questions that are the object of the first paragraph that has just been voted and that, as this part can easily be removed from the rest of this proposal, the latter can not be considered as modifying the whole of Article 5.

Mr. STRISOWER asks what exactly is the meaning of the first paragraph of Article 5 as it has just been voted; the expression "in time of peace" is not very clear; in order to know whether there is a state of peace should one examine the situation of a State to which the passing ship belongs or that of the State bordering the territorial sea? For him, moreover, the vote on the second proposal of Mr. KLEEN does not preclude a vote upon the third proposal offered by the same member.

For Mr. DESJARDINS the formula adopted is too general; for in time of war it might be invoked to oppose passage of merchant ships, which would evidently be contrary to the principle of the liberty of commerce.

Mr. STOERK thinks that the vote just taken should not be reconsidered; in case of war the littoral State places buoys and other instruments of defense in the area of the territorial sea; its right to prevent the passage of merchant ships must be recognized; the care of its interests and the necessity of defending its coast should authorize it to forbid all merchant ships passage through the territorial sea.

For Mr. VON BAR the difficulty proceeds from the fact that in Article 1 of the proposal the right recognized in the littoral State over the territorial sea has been called sovereignty.

Mr. E. ROLIN, declaring that he voted for Mr. Kleen's proposal, asks the author of the amendment kindly to define the meaning of the expression "in time of peace."

When may it be said, with reference to such or such an area of territorial sea, that there is or is not a time of peace? Mr. DESJARDINS also questions the vagueness of the adopted proposal; the one that Mr. Kleen made in the third place is much more precise since it only speaks of the warships of belligerents.

Mr. KLEEN thinks that the objection to his proposal should have been made before the vote; as to its meaning this is, with relation to a given area of territorial sea, that there is a state of war only when the littoral State is itself at war; on the other hand, different territorial seas may be governed by the laws of war, and the right of

passage may be forbidden there, by the mere fact that an armed conflict has broken out somewhere.

Mr. E. ROLIN thinks it would be excessive, for example, in case of a conflict between Japan and China, that Belgium could prohibit English ships from passing across the territorial sea bordering her coasts.

At the request of Mr. BARCLAY further discussion on the first paragraph of Article 5 is deferred to the afternoon meeting.

Meeting of March 29, 1894 (afternoon).

The PRESIDENT, in taking up the discussion at the point where it was left in the morning, puts to vote the whole of the new Article 5, of which the two parts had been voted separately.

Article 5 (new), paragraph 1, is rejected in total, and the deliberations are resumed for the purpose of finding a new formula that will gain the assent of the assembly.

Mr. BARCLAY proposes to grant at all times all ships, without distinction, the right of innocent passage through the territorial sea.

Mr. WESTLAKE desires to bring out a thorough discussion on such an important question. It is necessary to distinguish whether we are dealing with ships sailing along the coasts and crossing the territorial sea or with ships that are passing through straits.

As regards the first, the neutral State can not, indeed, prevent the passage of ships across its territorial waters.

As regards vessels passing through straits, they can not be refused the right of innocent passage through the straits; it is a law inscribed in history, one that has been exercised in particular in the war of France and England against Russia, and in the Franco-German war.

Mr. WESTLAKE will therefore vote for the article proposed by the committee.

Mr. KLEEN likewise supports the right of passage through straits, which must be kept untouched. He repeats his wording of this morning (see *ante*, p. 133).

Mr. DESJARDINS proposes an amendment sanctioning the principle proposed by the committee, to wit, right of innocent passage, but reserving to neutrals the right to issue regulations and prescriptions relating to this right of passage. He cites, in support, the declaration of neutrality of Italy in 1870, which fixes exactly to what point ships can cross territorial waters.

Mr. BARCLAY thinks that these declarations of neutrality have for their purpose not to place an obstacle to the passage across territorial waters but to guarantee neutrals against all eventual claims that might be addressed to them.

Mr. HALL fears that, with the exception proposed by Mr. Desjardins, regrettable inequalities will be produced between strong nations capable of issuing prescriptions and enforcing them, and weak nations powerless to do so. He therefore will vote with the committee.

Mr. DESJARDINS thinks that it is impossible to prevent neutral States from regulating in time of war the passage of warships of belligerents through the territorial sea. It is therefore necessary on the one hand to reserve this power of regulation and on the other to guarantee innocent passage in all other cases.

Mr. BARCLAY thinks that the danger to be avoided is the presence of the foreign warships; the word "innocent" offers sufficient guarantees to avoid this danger. Rules may be laid down, but violations of them are not provided against.

Mr. DESJARDINS also cites, in support of his proposal, the declaration of neutrality by Austria-Hungary in 1870, according to which, on the one hand, there are regulations for foreign warships, and on the other absolute liberty of navigation exists for merchantmen.

Mr. BARCLAY considers neutral States as obliged, in order to preserve their neutrality, to limit the obligations incumbent upon them as well as neutrals.

Mr. MARTENS does not see any possibility of an agreement if all cases are to be provided for; it is necessary to stop at defining some points involved in the determination of the extent of the territorial sea. He proposes to sanction the right of innocent passage through the territorial sea at all times and believes that the addition of Article 5 of the amendment proposed by Mr. Perels and voted this morning will be sufficient for that.

Mr. STRISOWER opposes the amendment of Mr. Perels to Article 5, saying there is a difference between the extent of the right of passage and the extent of the territorial sea. He will vote for the principle stated by Mr. Barclay, while reserving the right of a neutral State to watch the passage, an amendment to which Mr. Desjardins agrees.

Mr. DEN BEER POORTUGAEL sees in the right to regulate the passage in time of peace as in time of war, a logical and natural consequence of the right of sovereignty guaranteed by Article 1.

Mr. LAMMASCH considers as very difficult the precise distinction between what will be regarded as innocent passage and what will not. A discussion on this question might provoke a conflict between the neutral and the belligerent. A compromise is therefore necessary in order to limit the extension of war.

Mr. WESTLAKE fears that the conciliatory spirit shown in the proposal of Mr. Desjardins is a snare for neutrals.

Neutrality should be one and uniform, it should be practiced only in a single manner; belligerents ordinarily insist on obtaining from

neutral States a promise of a well-disposed neutrality. To give neutrals the right of fixing the manner in which they shall exercise neutrality is to open the door to every sort of complaint and claim.

Mr. KLEEN wishes to sanction the principle of the right of passage by wording the proposed exception as follows: "Nevertheless, in time of war, belligerents and States that have declared themselves neutral have the right to forbid access to their territorial waters by warships of belligerents."

Messrs. VON BAR and LAMMASCH propose the wording: "Measures and actions taken in time of war are excepted."

Mr. E. ROLIN introduces into the wording of the article a series of distinctions in order to make a vote possible; and he informs the assembly that his wording has no other object than to facilitate putting the question; as for himself, when the principle is once voted he will oppose any addition.

The new wording follows:

All ships without distinction have the right of innocent passage through the territorial sea, saving to belligerents the right of forbidding or regulating such passage in their territorial waters and the right of neutrals of regulating the passage of ships of war of all nationalities through their waters.

The article thus worded is successively voted in its three parts, and finally definitely adopted in total.

Mr. Martens takes the chair.

Article 5 (new), paragraph 2.—Crimes and offenses committed on board a foreign ship passing through the territorial sea and not involving a violation of the rights or interests of the littoral State or of its *ressortissants*, are outside the jurisdiction of the littoral State.

Mr. PERELS proposes the following change: "Crimes and offenses committed on board a foreign ship which is only crossing the territorial sea are outside the jurisdiction of the littoral State."

Mr. VON BAR states an amendment which, in conformity with the resolutions voted at Munich, would submit to the jurisdiction of the littoral State only crimes and offenses whose effects extend to the shore or to other ships. Crimes and offenses whose effects are spent exclusively on the ship in territorial waters are not cognizable by the littoral State.

Mr. PERELS maintains his amendment. The right of surveillance is guaranteed by paragraph 3 of the article; it exists in any case. But it is necessary to distinguish ships that are crossing the territorial sea from those that sojourn there; it is to the latter only that the jurisdiction of the littoral State can extend; the former, which merely proceed along the coast in the territorial sea, are exempt from this jurisdiction.

Mr. ALBÉRIC ROLIN criticises the proposal of the committee and modifies its wording as follows:

Crimes and offenses committed on board a foreign ship passing through the territorial sea are not considered as committed on the territory of the littoral State and as falling for that reason alone within the jurisdiction of that State.

Mr. RENAULT is in agreement with Mr. Rolin; the littoral State may be competent on another ground, and there may be a certain danger in laying down as a principle the rule stated by the committee. The opinion of the Council of State delivered November 20, 1806, which is advanced as opposed to this view, applies only to ships in ports; and England herself has admitted that the jurisdiction of the littoral State could not extend to all cases. It ought to be admitted only so far as required by the right of sovereignty over the territorial sea.

Mr. DESJARDINS is in agreement so far as concerns police and order, as well as for the withdrawal from the jurisdiction of the littoral State of all that happens on board the ship itself; but, what of the case in which, in French territorial waters for example, one of the sailors of a French bark is struck by a projectile discharged by a foreign ship traversing these waters?

Mr. RENAULT sees in this case two competent jurisdictions—that of the State of the ship that fired the shot, and that of the State of which the victim is the subject.

Mr. BARCLAY himself desires that the application of the article be restricted to acts happening on the vessel itself.

Mr. ALBÉRIC ROLIN remarks that the same case might occur from one frontier to another; it ought not to be through the mere fact that the foreign ship is in the territorial waters of a State that the latter becomes competent to exercise its jurisdiction.

Mr. DESJARDINS does not believe in the extritoriality of merchantmen, which are, so to speak, a private house. While in agreement on the solution he would like to see a different wording adopted for the article.

Mr. FÉRAUD-GIRAUD considers everything that can affect the sovereignty or the subjects of the littoral State to be within its jurisdiction. Indeed, even on a foreign vessel an act may occur such as to fall within the jurisdiction of the littoral State; thus, an assault upon a pilot sent by the littoral State on board the foreign vessel.

Mr. LYON-CAEN takes a more usual example, that of collision; the jurisdiction of the littoral State should cover this. The wording proposed therefore needs explanation and is not satisfactory.

Mr. LAMMASCH declares himself against the proposal of Mr. Albéric Rolin because of its negative form. Is there not some inconvenience in stating so categorically as a principle the idea that the State would exercise no right over a foreign vessel? Instead of then stipulating certain special cases enumerated by way of restriction, Mr. Lammasch thinks that on the contrary the right of sovereignty

should be frankly recognized at the outset and that then the exceptions to this ruling principle should follow, exceptions concerning crimes whose effects expend themselves exclusively on board the ship. If the State in whose territorial waters continued crime is committed is not competent to pronounce judgment and check it, its sovereignty would be illusory.

According to Mr. VON BAR, the wording of Mr. Albéric Rolin does not state how the place where the crime is committed is to be determined. Is it where the person committing the crime is, or is it rather where the effect of the crime is produced?

Mr. ALBÉRIC ROLIN defends his wording by emphasizing the principle of extritoriality which, although perceptibly exaggerated with respect to warships, is as a general rule applied even to merchantmen. This principle, according to him, dominates all others, and bends only in certain exceptional cases. These cases are provided for in paragraph 3 of the committee's draft, which imposes upon vessels traversing territorial waters the obligation of observing the special rules issued by the littoral State in the interest and for the safety of navigation and for police purposes. Now these regulations for the security of navigation assure to the littoral State the possibility of taking effective precautions against acts that prejudice that security—against collisions, for example. The principle of the sovereignty of the littoral State is thus sufficiently safeguarded; there is, therefore, no danger in recognizing in Article 2 the principle of extritoriality.

Mr. CLUNET states that the Institute, after having sanctioned in Article 1 the principle of sovereignty—in too general a way according to him—has been led to make the first breach in this principle by adopting the right of innocent passage. A second breach is now contemplated, that of depriving the littoral State of another bit of its sovereignty, particularly the right of passing judgment upon acts committed in territorial waters.

To render this breach less noticeable he favors:

(1) Substituting for the words "crimes committed on board a foreign ship passing through the territorial sea" the words, "crimes committed on board a foreign ship in the territorial sea;"

(2) retaining the clause indicated by paragraph 2 of the draft and expressed in the words "and not involving a violation of the rights or interests of the littoral State";

(3) emphasizing the meaning of the draft as regards subjects of the littoral State, by adding the words "or of its subjects not a part of the crew or passengers of the ship."

Mr. BARCLAY agrees in part with the remarks of Mr. Clunet and proposes the following wording:

Crimes and offenses committed on board a ship passing through the territorial sea are outside the jurisdiction of the littoral State, unless the effects of these crimes and offenses extend beyond the ship and have a harmful effect upon the interests of the littoral State or of its subjects.

The PRESIDENT: The Institute is to decide upon the three amendments proposed by Messrs. von Bar, Albéric Rolin, and Clunet, and also upon the fourth amendment of Mr. Glasson, worded as follows:

The littoral State does not exercise its jurisdiction over foreign vessels passing in the territorial sea, if in cases of crimes or offenses committed by persons or things on board the same vessels, unless they involve a violation of the rights or interests of this littoral State.

Mr. PERELS says that he withdraws his amendment, and Mr. Barclay accepts the proposal of Mr. Clunet.

The assembly successively rejects the amendments of Messrs. von Bar, Albéric Rolin, and Glasson.

Then it adopts the proposal of Mr. Clunet under the following form, making this provision a distinct article numbered 6 (instead of 5, par. 2) :

Article 6. Crimes and offenses committed on board a foreign ship passing through the territorial sea and not involving a violation of the rights or interests of the littoral State or of its *ressortissants*, who are not a part of the crew or passengers, are outside the jurisdiction of the littoral State.

Mr. RENAULT resumes the chair.

Article 7. Ships which pass through territorial waters shall conform to the special regulations decreed by the littoral State in the interest and for the security of navigation or as matter of maritime police.

Adopted.

Article 8. Every ship that anchors, tacks about, or hovers in territorial waters subjects itself to the jurisdiction of the littoral State. The littoral State has the right to continue its pursuit on the high sea in order to seize one that has committed a breach of law within its waters. In case, however, of capture on the high sea, the fact shall be notified to the State to whom the delinquent belongs, and in the absence of any claim on the part of that State, judgment shall be given in conformity with the law of the littoral State.

Breach of law, for the application of this article, will be understood to mean breaches exposing the delinquent to penalties or the ship to confiscation.

The PRESIDENT remarks that Article 8 touches several different questions that should be discussed separately. Consequently, he puts into discussion only the first sentence of Article 8: "Every ship that

anchors, tacks about, or hovers in territorial waters subjects itself to the jurisdiction of the littoral State."

Mr. STRISOWER proposes to substitute "is subject" for the expression "subjects itself," and Mr. CLUNET, to say "ships" instead of "every ship."

Consequently, the beginning of Article 8 is put under discussion in the following form: "Ships that anchor, tack about or hover in territorial waters are subject to the jurisdiction of the littoral State."

Mr. PRADIER-FODÉRÉ finds the expression "anchor, tack about, or hover" not clear enough.

Mr. ALBÉRIC ROLIN thinks the words "tack about" should be omitted.

Mr. E. ROLIN proposes a new wording:

Ships of every nationality are subject to the jurisdiction of the littoral State by reason of the simple fact that they are in territorial waters, unless they are only passing through them.

Adopted.

The PRESIDENT puts the next paragraph of the same article in discussion: "The littoral State has the right to continue its pursuit on the high sea in order to seize one that has committed a breach of law within its water."

Mr. GLASSON proposes to add the words "and pass judgment" and to give the second paragraph the following form: "The littoral State has the right to continue its pursuit on the high sea, to seize and pass judgment on the ship which has committed a breach of law within its waters."

The PRESIDENT reads the following sentence of the same Article 8: "In case, however, of capture on the high sea, the fact shall be notified to the State to whom the delinquent belongs, and in the absence of any claim on the part of that State judgment shall be given in conformity with the law of the littoral State."

Mr. DESPAGNET declares that he can not admit that the competence of the littoral State can depend upon the fact that another State has made or not made a claim.

Mr. BARCLAY, the reporter, justifies the tenor of the third paragraph by the seriousness that is presented by the pursuit of a foreign ship to and upon the open sea. Hence the necessity of notifying the fact of capture. If claims are caused the question shall be settled through the diplomatic channel; an absence of claim will imply the recognition of the competence of the littoral State, which can thus exercise its jurisdiction.

Mr. STRISOWER asks if the reporter would not consent to change the words "in conformity with the law of the littoral State" to "by the courts of the littoral State."

Mr. PERELS would like to substitute the expression "to the State whose flag the ship flies" for "to the State to which the delinquent belongs."

Mr. GLASSON proposes to add after the word "notified": "immediately" or "without delay."

Mr. BARCLAY accepts these three modifications.

The PRESIDENT, Messrs. CLUNET and DESPAGNET would like to omit the sentence: "In the absence of any claim on the part of the State, judgment will be given by the courts of the littoral State."

The reporter consents thereto.

Mr. DESPAGNET speaks of the exaggerations to which a right of unlimited pursuit might give rise. He proposes an amendment as follows: "The pursuit shall be interrupted and can not be resumed, as soon as this ship shall have entered a port of its own country or of a third Power."

Adopted.

Article 8 is finally adopted in the following form:

Article 8. Ships of every nationality are subject to the jurisdiction of the littoral State by reason of the simple fact that they are in territorial waters, unless they are only passing through them.

The littoral State has the right to continue its pursuit on the high sea, to seize and pass judgment on the ship which has committed a breach of law within its waters.

In case of capture on the high sea, the fact shall be notified without delays to the State whose flag the ship flies.

The pursuit shall be interrupted and can not be resumed, as soon as this ship shall have entered a port of its own country or of another Power.

Article 9. Exterritoriality of ships of war and of those that are assimilated to them is not affected by the provisions above.

Mr. STOERK would prefer to have the expression "exterritoriality" omitted and to say "the rights of ships of war * * * are reserved."

The PRESIDENT proposes the following wording:

The peculiar situation of ships of war and the ships assimilated to them is reserved.

Adopted.

Article 10. This article concerns only straits whose breadth does not exceed 12 miles.

The provisions of the preceding articles apply to them subject to the following modifications and distinctions:

1. Straits whose shores belong to different States form part of the territorial sea of the littoral States, which will exercise their jurisdiction to a line drawn halfway between them.

2. Straits whose shores belong to the same State and which are indispensable to maritime communication between two or more

States other than the littoral State form part of the territorial sea of such State, whatever the distance between the coasts.

3. Straits whose shores belong to the same State, but which communicate only with that State and have a breadth more or less similar to that of rivers, are assimilated to the latter.

The PRESIDENT proposes a slight modification of the first two sentences of Article 10:

The provisions of the preceding articles apply to straits whose breadth does not exceed 12 miles, subject to the following modifications and distinctions.

Adopted.

On the subject of paragraph 1, Mr. STRISOWER, supported by the President, prefers the word *sovereignty* to *jurisdiction*.

Mr. MATZEN is opposed to this change and only admits a division between two respective jurisdictions and not between two sovereignties. He cites the example of the sea which separates Sweden and Denmark and which, with regard to sovereignty, is considered as a common sea. In time of war Denmark has taken prizes of German ships in the Swedish part of the strait without causing claims either on the part of Sweden or of Germany; on the contrary, from the point of view of jurisdiction, each of the littoral States exercises it within strictly determined limits.

The PRESIDENT observes that this is an exceptional situation based upon a tacit agreement and that it can not lessen the scope of the general rule.

Paragraph 1 is adopted as follows:

Straits whose shores belong to different States form part of the territorial sea of the littoral States, which will exercise their sovereignty to the middle line.

On the subject of paragraph 2, Mr. E. ROLIN points out that in adopting it the Institute would risk authorizing the closing of straits between two open seas; he proposes the following wording:

Straits which serve as a usual passage from one open sea to another can never be closed.

Mr. FÉRAUD-GIRAUD would prefer "to another open sea."

Mr. MATZEN votes for the amendment with the reservation that where there are three straits (like The Sound, the Great and Little Belts), the littoral State will have the right to close one or two of them provided that a third be left open.

Paragraph 2 is adopted according to the wording proposed by Mr. E. Rolin.

Paragraph 3 is rejected.

The PRESIDENT asks the committee to look over the resolutions taken by the assembly to determine the final text and to submit it at the next meeting of the Institute for its consideration.

The meeting adjourns at 6 p. m.

Meeting of March 31, 1894.

Mr. BARCLAY, the reporter, states that the committee has given a final form to the wording of the different articles voted by the Institute. The modifications made are purely formal; it has been sought to connect up the proposals successively adopted.

After an exchange of remarks of Mr. BARCLAY and the PRESIDENT, it is decided that the Institute will decide successively on each provision of the draft and that the vote will begin with the preamble.

The preamble laid before the assembly for its vote is as follows:

Considering that there is no longer reason to confound in a single zone the distance necessary for the exercise of sovereignty and for the protection of coastwise fishing and that which is necessary to guarantee the neutrality of non-belligerents in time of war;

That the distance most generally adopted of 3 miles from low-water mark has been recognized as insufficient for the protection of coastwise fishing;

That this distance moreover does not correspond to the actual range of guns placed on the coast.

The PRESIDENT observes that he does not understand why in the beginning of the preamble it is said that there is no *longer* reason to confound in a single zone the two distances in question: does not the wording indicated seem to imply that, according to the Institute, there was a time when the two zones ought to be confounded? In this view is not this provision outside the ordinary rôle of the Institute which does not consist in seeking out what has been, but in determining what is and in providing for what is to be?

Mr. PRADIER-FODÉRE says that the provision contains some other defects of wording; he therefore proposes to leave to the bureau the duty of giving the preamble its final form.

The assembly supports this view.

The REPORTER asks that the wording be reached in agreement with him.

The PRESIDENT declares that the bureau will certainly consult the reporter, but the outcome of the wording to be adopted by the bureau can not be subordinated to a preliminary and forced agreement with the reporter.

Article 1 proposed by the committee is as follows:

The State is sovereign over a zone of the sea washing the coast subject to the right of innocent passage reserved in Article 5.

This zone bears the name of territorial sea.

Thinking that it is necessary not to qualify in too absolute a way the right recognized in the littoral State over the territorial sea, Mr. LYON-CAEN proposes to say "The State has a right of sovereignty. . . ."

Mr. DESJARDINS approves the correction proposed by Mr. Lyon-Caen; he also remarks that the exact expression to employ, which is unfortunately seldom used, would be to say that the State has an *imperium*.

Mr. BARCLAY asks how the phrase proposed by Mr. Lyon-Caen could be translated into English; he would prefer a formula suggested to him by the remark of Mr. Desjardins and to say that the State has a right of empire. He wishes to say that the committee took no account of a distinction between the right of sovereignty and the right of property, these two rights belonging to two different classes of ideas; one to international law, the other to private law. What it wished to state is that the right of the littoral State is affected by no diminution nor exception, save the right of innocent passage. The wording proposed by it was: "The State is sovereign over a zone," etc. Originally it was "exclusive sovereign." The word "exclusive" was taken out as superfluous with the word "sovereign." Now, "a right of sovereignty" seems to indicate less than absolute "sovereignty," just as "a right of property" indicates less than absolute "property." The use of the word *right* would also put on the same footing the two rights spoken of in Article 1. Articles 5 and 8 prove that this is not the intention of the authors of the regulations.

Mr. HARBURGER proposes to say that the State has "the right of sovereignty,"

Finally, Article 1 is adopted by 25 votes to 8, with the modification proposed by Mr. LYON-CAEN.

Articles 2, 3, and 4 of the committee's draft are adopted without discussion.

Article 5 is adopted with a slight modification proposed by Mr. PERELS; this article is worded as follows:¹ . . .

Article 6 is adopted after debate; it is thus worded:

Crimes and offenses committed on board foreign ships passing through the territorial sea by persons on board of them, against persons or things on board the same ships, are outside the jurisdiction of the littoral State, unless they involve a violation of the rights or interests of the littoral State or of its *ressortissants* not forming part of the crew or passengers.

The PRESIDENT, without wishing to reconsider a vote already taken, would remark nevertheless that Article 6 deprives littoral States of the right of jurisdiction only for crimes and offenses committed on board foreign vessels passing through the territorial sea; this right

¹ *Post*, p. 148.

of jurisdiction exists therefore with respect to infractions committed on board ships which, for example, are stationed in the territorial sea.

Article 7 is adopted after substituting the word "ships" for the word "vessels."¹ . . .

Article 8 of the committee's project is worded thus:¹ . . .

The PRESIDENT remarks that the sentence beginning "the pursuit must be interrupted" is due to the initiative of the committee and that the Institute has not yet been asked to decide on its provisions.

MR. BARCLAY admits the justice of this remark but does not think that the committee has departed from the ideas that the members seemed to share in the full meeting. Mr. Barclay insists on the difference between the case where a pursued ship enters a territorial sea and that where it enters a port; in the first case the pursuit is interrupted; in the other it ceases absolutely.

The PRESIDENT finds that certain expressions are not happy; he asks if it can be said that judgment is passed on a ship.

It is understood that the bureau will decide on the final wording of this article, and on motion of Mr. Martens that it will contain two paragraphs, of which the second will begin with the words: "The littoral State has the right to continue, etc."

Article 9 is adopted without debate; it is thus worded:¹ . . .

Speaking of Article 10, Mr. DESJARDINS remarks that the provisions of Article 11 are of a nature to counteract those of Article 10, and so a debate ensues upon Article 11.

MR. DESJARDINS. The provision of Article 11 does not appear among those that the Institute has already decided on; it would be well to omit it because it might be relied upon to prohibit passage from one open sea to another open sea.

MR. E. ROLIN does not think that such was the meaning of the article. It was simply desired to except conventions actually in force. In order to fix the meaning of the committee, Article 11 might be worded as follows:¹ . . .

On a vote of 19 votes to 17, Article 11 is retained in the project, and the wording proposed by Mr. E. Rolin is then adopted without discussion.

Finally, Article 10 is adopted with a slight modification in wording:¹ . . .

The entire project relating to the territorial sea is adopted without remarks.

The text as revised by the bureau and the reporter follows:

¹ *Post*, p. 149.

RULES ADOPTED BY THE INSTITUTE OF INTERNATIONAL LAW AT PARIS,
MARCH 31, 1894, ON THE DEFINITION AND THE RÉGIME OF THE
TERRITORIAL SEA.¹

The Institute:

Considering that there is no reason to confound in a single zone the distance necessary for the exercise of sovereignty and for the protection of coastwise fishing and that which is necessary to guarantee the neutrality of non-belligerents in time of war:

That the distance most generally adopted of 3 miles from low-water mark has been recognized as insufficient for the protection of coastwise fishing;

That this distance, moreover, does not correspond to the actual range of guns placed on the coast;

Has adopted the following provisions:

ARTICLE 1. The State has a right of sovereignty over a zone of the sea washing the coast, subject to the right of innocent passage reserved in Article 5.

This zone bears the name of territorial sea.

ART. 2. The territorial sea extends 6 marine miles (60 to a degree of latitude) from the low-water mark along the full extent of the coasts.

ART. 3. For bays, the territorial sea follows the sinuosities of the coast, except that it is measured from a straight line drawn across the bay at the place nearest the opening toward the sea where the distance between the two sides of the bay is 12 marine miles in width, unless a continued usage of long standing has sanctioned a greater breadth.

ART. 4. In case of war a neutral littoral State has the right to fix, by declaration of neutrality or by special notification, its neutral zone beyond 6 miles up to the range of coast artillery.

ART. 5. All ships without distinction have the right of innocent passage through the territorial sea, saving to belligerents the right of regulating such passage and, for the purpose of defense, of forbidding it to any ship, and saving to neutrals the right of regulating the passage of ships of war of all nationalities through the said sea.

ART. 6. Crimes and offenses committed on board foreign ships passing through the territorial sea by persons on board of them, against persons or things on board the same ships, are as such outside the jurisdiction of the littoral State, unless they involve a violation of the rights or interests of the littoral State or of its *ressortissants* not forming part of the crew or passengers.

¹ *Annuaire*, vol. 18, p. 328.

ART. 7. Ships which pass through territorial waters shall conform to the special regulations decreed by the littoral State in the interest and for the security of navigation or as matter of maritime police.

ART. 8. Ships of all nationalities are subject to the jurisdiction of the littoral State by reason of the simple fact that they are in the territorial waters, unless they are only passing through them.

The littoral State has the right to continue on the high sea a pursuit commenced in the territorial sea, and to seize and pass judgment on the ship which has committed a breach of law within its waters. In case, however, of capture on the high sea, the fact shall be notified without delay to the State whose flag the ship flies. The pursuit must be interrupted as soon as the ship enters the territorial sea of its own country or of a third Power. The right to pursue ceases as soon as the ship has entered a port of its own country or of a third Power.

ART. 9. The peculiar situation of ships of war and the ships assimilated to them is reserved.

ART. 10. The provisions of the preceding articles apply to straits whose breadth does not exceed 12 miles, subject to the following modifications and distinctions:

1. Straits whose shores belong to different States form part of the territorial sea of the littoral States, which will exercise their sovereignty to the middle line.

2. Straits whose shores belong to the same State and which are indispensable to maritime communication between two or more States other than the littoral State always form part of the territorial sea of such State, whatever the distance between the coasts.

3. Straits which serve as a passage from one open sea to another open sea can never be closed.

ART. 11. The *régime* of straits actually governed by special conventions or usages remains reserved.

[The subject was taken up again by the Institute for reasons as shown in the early paragraphs of the following report of Mr. Barclay:]

*Report of Sir Thomas Barclay, Reporter of the Sixth Committee.*¹

As reporter of the committee on the territorial sea that finished its work at the Paris session in 1894 by the adoption of regulations, I had communicated to the Institute two reports that appeared in the *Annales* of 1892 and 1894. In these reports the considerations that brought about the regulations mentioned are minutely set forth.

At the Madrid session in 1911, I was appointed to resume study of the subject, which, during the 15 years elapsed, had undergone changes necessitating a new examination.

¹ *Annuaire*, 1912, vol. 25, p. 375. Members of the committee: Asser, den Beer Poortugael, Harburger, de Montluc, Nys, d'Ollivart, Albéric Rolin, Westlake, Wilson, and de Lapradelle.

Since 1894, in fact, there have been keen discussions of principle and of practice as well as an arbitral award, which have considerably increased the documents on questions touching the territorial sea. Moreover, an international commission has been instituted under the name of International Council for the Exploration of the North Sea; to study the nautical history of the fisheries in the North Sea which seems to be the beginning of a general movement along this line. These new facts should receive study.

Before going into the subject at length, let me recall the history of our own regulations since 1894. The International Law Association had charged me to make a report to it on the same question and at the Brussels session in 1895 the regulations of the Institute were adopted with several slight modifications which are indicated in italics in the text printed as an appendix to the present report.

Especial note will be taken of the third paragraph of Article 10 which I have added for the purpose of removing a doubt that arose in the Chishima case (*The Government of Japan v. The Peninsular and Oriental Navigation Company*), a collision that occurred in the inland sea of Japan. The Consular Court of Appeal at Shanghai treated this sea as the high seas. The Judicial Committee of the Privy Council (the High Court of Appeal for the colonies) at London, which decided the case without going into the question of the nature of the Inland Sea, refused its sanction to the proposition of the president of the Consular Court at Shanghai.

In 1896 the Netherlands Government called the project of the Institute and of the International Law Association to the attention of the European Governments. The Netherlands Government, nevertheless, has not adopted the essential principle of the project. In a note addressed to the several Powers, it pointed out "the desirability of fixing by an international convention the limit of the territorial sea." Through serious study of this question, the Netherlands Government had "become convinced that the conclusion of such a convention by the principal maritime Powers would be a very desirable act." It thought, however, that as a basis for eventual negotiations on the subject, the proposition should be adopted that a distance of 6 miles, 60 to a degree, should serve to fix the limit of the territorial sea, and that it would be desirable at the same time to declare the same delimitation and width generally obligatory for the neutral zone at sea.

The answers were not unfavorable, and if the British Government had taken the proposition of the Netherlands Government into serious consideration, it is probable that a diplomatic conference would have been called. The Government of the United States was not "indisposed" to adhere to it if a sufficient number of other Powers would also adhere to it. The German Government thought that the ques-

tion was not yet ripe for regulation by international convention, but it was disposed to deal with the existing difficulties through separate regulations. It would be interesting to know more exactly the point of view of the German Government on this subject. The Russian Government answered that it was much inclined to adopt the idea of fixing the limits of the territorial sea by an international convention, that it would welcome the idea with much sympathy, if the Government of the Netherlands would take the initiative and call a meeting of the Conference, and that Russia would certainly be represented there if the principal maritime Powers were present as expected, but that *a priori* there was an objection to the proposed width, a question of detail, however, which might be left to the decision of the Conference. The Portuguese Government was favorable without restriction. That of Austria-Hungary was by no means unaware "of the correctness of the considerations underlying the Netherlands project and the advantages that an international sanction of the principles of maritime law stated by the cabinet of The Hague would offer," but in view of "the geographical situation of the Austro-Hungarian Monarchy, whose coasts have only a limited extent," the realization of the idea in question had only a secondary interest for Austria-Hungary. The Ministry of Foreign Affairs in agreement with the Governments at Vienna and Budapest was consequently of the opinion that it belonged first of all to the great maritime Powers primarily interested in the projected innovation to come to an understanding on the adoption of these principles in international relations, while reserving to itself the right to adhere to the decisions that those Governments might deem fit to make in the premises. The Spanish Government acknowledged the importance of the proposition and the practical interests resulting therefrom, but since it was a matter interesting all maritime Powers, the majority of which had not yet come to a decision, it thought it well to wait until the other Powers had given their opinion. Finally, Great Britain was frankly unfavorable. The answer given to the minister of the Netherlands was that the extension of the limit from 3 to 6 miles was not desired by England. "And, when I remarked to Lord Salisbury," said the Netherlands minister in his dispatch, "that Great Britain, in view of the extent of her coasts and fisheries, should more than any other nation desire an extension of the territorial sea, he answered in his customary playful manner: 'But then we couldn't come any more to fish on your coasts, for whatever may be the extent of our own, it is with you that the fish are always found.'" That was the burial for the time being of the question, and the Dutch Government did not think it of use to push its negotiations further.

If the question of the territorial sea from the point of view of an international agreement had remained as it was at the time when the

Institute adopted its 1894 regulations, the States bordering on the North Sea have not ceased to give careful study to a matter intimately connected therewith. This is the usefulness of extending the margin of 3 marine miles (which the Institute proposed to increase to 6 miles) for the requirements of fishing. At two conferences, the first held at Stockholm in June, 1899, at which Great Britain, Sweden, Norway, Germany, Denmark, and Russia were represented, and the second at Christiania where the same Powers were represented with the addition of Belgium and Finland, an agreement was reached that fishing in the North Sea constitutes a common interest of the peoples dwelling along its coasts.

Out of these two conferences arose the "International Council for the Exploration of the North Sea," with its permanent seat at Copenhagen as mentioned above.

The objects of this Council were laid down in the programs drawn up at those conferences. In the preambles it was declared that the reason for the Council was the increase and improvement of the fisheries. For this reason the Council undertook to obtain more exact information concerning the currents and changes taking place in the sea in question in different seasons, and of the circumstances upon which depend the variations of the food for the fish that is suspended in the water, as well as the appearance and disappearance of migrating fish in these waters. Systems of observation have been built up, each country belonging to the Council making the scientific research necessary in the marine region nearest its own coasts. Through these simultaneous and similar observations a coordination of results is obtainable on bases permitting comparison and the creation of a common fund of information in all matters concerning the fish in the seas.

The first meeting of the Council took place in July, 1902. Since its creation the Council has held numerous plenary meetings as well as partial ones. Two committees especially have been appointed to study the migration of certain fish and the relation between fishing and increase. The assembling of the data is the work of the bureau at Copenhagen, whose reports are valuable documents on questions of fishing, an essential element in the study of the question of the territorial sea.

On the English side, two important official committees on fisheries have met, in 1901-2 and 1907-8; the question of the extension of the territorial sea has been broached several times.

In 1910 were held the meetings of the Court of Arbitration of The Hague to interpret the convention of October 20, 1818, between Great Britain and the United States regulating the fishing on the North Atlantic coast of America. The court was composed of our eminent colleague Lammasch as president; Jonkheer A. F. de Savornin-

Lohman (Netherlands); Mr. Luis Maria Drago, (Argentine); Mr. George Gray (United States); and Mr. Charles Fitzpatrick (Canada). In this arbitration the situation of bays and gulfs gave rise to a difference of opinion among the arbitrators. The representatives of the United States had claimed that the margin of 3 marine miles was a principle of international law that applied to bays as well as to the other sinuosities of the coast. The court did not accept this argument for the following reasons:

Because admittedly the geographical character of a bay contains conditions which concern the interests of the territorial sovereign to a more intimate and important extent than do those connected with the open coast. Thus conditions of national and territorial integrity, of defense, of commerce and of industry are all vitally concerned with the control of the bays penetrating the national coast line. This interest varies, speaking generally in proportion to the penetration inland of the bay; but as no principle of international law recognizes any specified relation between the concavity of the bay and the requirements for control by the territorial sovereignty, this tribunal is unable to qualify by the application of any new principle its interpretation of the treaty of 1818 as excluding bays in general from the strict and systematic application of the 3 mile rule; nor can this tribunal take cognizance in this connection of other principles concerning the territorial sovereignty over bays such as 10 mile or 12 mile limits of exclusion based on international acts subsequent to the treaty of 1818 and relating to coasts of a different configuration and conditions of a different character.

The Tribunal attempted to give a definition of the word "bay" as follows:

An indentation of the coast, bearing a configuration of a particular character easy to determine *specifically*, but difficult to describe *generally*.

The negotiators of the treaty of 1818 most probably thought that everybody would know what was a bay. In this popular sense the term must be interpreted in the treaty. The interpretation must take into account all the individual circumstances which for any one of the different bays are to be appreciated, the relation of its width to the length of penetration inland, the possibility and the necessity of its being defended by the State in whose territory it is indented; the special value which it has for the industry of the inhabitants of its shores; the distance which it is secluded from the highways of nations on the open sea and other circumstances not possible to enumerate *in general*.

The decision concluded that in the case of bays the 3 marine miles were to be measured from a straight line drawn across the opening at the place "where it ceases to have the configuration and characteristics of a bay." In all other places the 3 miles were to be measured following the sinuosities of the coast.

Mr. DRAGO did not concur in this decision, which really evaded the question to be solved, declaring, not without reason, that there would need to be a new convention to decide what openings had "the configuration and characteristics of a bay."

In Great Britain where the fishing industry exceeds in importance that of any other country, opinion is much divided on the subject of the extension of the limit of 3 marine miles, and as to the treatment of bays. While it must be admitted that in the case of the great Scotch bays that penetrate the land for a great distance, the coast police should have a right to enforce observance of the regulations laid down by the adjacent State especially for the preservation of fishing, it is feared that the extension of the limits recognized by the North Sea Convention might result in restricting the free area for sea fishing in general to the detriment of British fishing. The wisdom of proceeding with care on all sides has been demonstrated by the proposal of the Russian Government early in 1910 to forbid foreign fishermen from prosecuting their trade in a vast extent in the sea of Barents suitable for fishing. It was intended to mark out a zone 12 miles wide from a line between the two capes, Saviatoi and Kanin which are about 120 marine miles apart. This pretension was not maintained.

In another direction it is necessary in the new regulations to be laid down to take into account the Hague Convention of 1907 respecting the rights and duties of neutral Powers in naval war, which regulations contain a certain number of provisions touching "territorial waters." Let me say in passing that this Convention was not well drafted and needs to be modified.

The modifications that I propose have necessarily, for the reasons above indicated, a temporary character. I do not think the time opportune to attempt to do more during this session than to state certain bases for a more thorough study to be undertaken by the Committee.

There is especial need for a new investigation on different points. I emphasize three—bays, islands, and submerged banks.

In the following draft regulations I have divided the subject into three parts.

1. The nature of territorial *waters* (a term that the Hague Conference borrowed from the English rather than "territorial sea," which involves circumlocution in expression);

2. The rights of a littoral State;

3. Relations between belligerents and neutrals.

Wherever I have not explained the changes and additions that I have made in this report I will explain them in notes from time to time in the course of the development of this draft.

N. B.—The articles of our 1894 regulations are printed in black-faced type. The passages which I propose to omit are placed between brackets; the additions are indicated by italics, and the articles of the Hague Convention on belligerents and neutrals are in ordinary characters.

PRELIMINARY PROJECT.

The Institute,

Considering that there is no reason to confound in a single zone the distance necessary for the exercise of sovereignty and for the protection of coastwise fishing and that which is necessary to guarantee the neutrality of non-belligerents in time of war;

[That the distance most generally adopted of 3 miles from low-water mark has been recognized as insufficient for the protection of coastwise fishing;

That this distance moreover does not correspond to the actual range of guns placed on the coast;]

That as the questions relating to the protection of marine fishing are undergoing change, it is best to leave them out of consideration;

That the use of the high sea is free, with the exception nevertheless, of such restrictions as interested States may mutually agree to impose upon themselves;¹

That any sovereignty claimed over a part of the open sea beyond 3 marine miles implies for the littoral State the effective exercise of the said sovereignty;²

THE NATURE OF THE TERRITORIAL SEA.

Has adopted the following provisions:

Article 1. The State has a right of sovereignty over a zone of the sea washing the coast, subject to the right of innocent passage reserved in Article 5.

This zone bears the name of territorial sea.

Article 2. The territorial sea extends 6 miles (60 to a degree of latitude) from the low-water mark along the full extent of the coasts.

Article 3. For bays, the territorial sea follows the sinuosities of the coast, except that it is measured from a straight line drawn across the bay at the place nearest the opening toward the sea where the distance between the two sides of the bay is 12 marine miles in width, unless a continued usage of long standing has sanctioned a greater breadth.³

¹ In the course of the debates in the case of the North Atlantic Fisheries at The Hague, representatives of the United States maintained that a right to the liberty of the high sea can not be abandoned.

² Here we have a principle that seems to be indicated by provisions (see Articles 8 and 25) of the Hague Convention of 1907, whose operation is limited in a way to produce the impression that without them the effective sovereignty would be strictly adhered to. Moreover, the analogies are favorable to the recognition of this principle.

³ See *post*, p. 158. Questions of the reporter.

Article 10. [The provisions of the preceding articles apply to straits whose breadth does not exceed 12 miles, subject to the following modifications and distinctions]:

1. Straits whose shores belong to different States form part of the territorial sea of the littoral States, which will exercise their sovereignty to the middle line.

2. Straits whose shores belong to the same State and which are indispensable to maritime communication between two or more States other than the littoral State always form part of the territorial sea of such State, whatever the distance between the coasts. They can never be barred.

In straits whose coasts belong to the same State, the sea is territorial even though the spread of the coasts exceeds 12 miles, if at the entrance of the strait that distance is not exceeded.

3. Straits which serve as a passage from one open sea to another open sea can never be closed.

Article 11. The régime of straits actually governed by special conventions or usages remains reserved.

RIGHTS OF THE LITTORAL STATE.

Article 6. Crimes and offenses committed on board foreign ships passing through the territorial sea by persons on board of them, against persons or things on board the same ships, are as such outside the jurisdiction of the littoral State, unless they involve a violation of the rights or interests of the littoral State or of its *ressortissants* not forming part of the crew or passengers.

Article 8. Ships of all nationalities are subject to the jurisdiction of the littoral State by reason of the simple fact that they are in the territorial waters, unless they are only passing through them.

The littoral State has the right to continue on the high sea a pursuit commenced in the territorial sea, and to seize and pass judgment on the ship which has committed a breach of law within its waters. In case, however, of capture on the high sea, the fact shall be notified without delay to the State whose flag the ship flies. The pursuit must be interrupted as soon as the ship enters the territorial sea of its own country or of a third Power. The right to pursue ceases as soon as the ship has entered a port of its own country or of a third Power.

Article 9. The peculiar situation of ships of war and the ships assimilated to them is reserved.

BELLIGERENTS AND NEUTRALS.

Article 4. [In case of war a neutral littoral State has the right to fix, by declaration of neutrality or by special notification, its neutral zone beyond 6 miles up to the range of coast artillery.]

Article 5. All ships without distinction have the right of innocent passage through the territorial sea, saving to belligerents the right of regulating such passage and, for the purpose of defense, of forbidding it to any ship, and saving to neutrals the right of regulating the passage of ships of war of all nationalities through the said sea.

The neutrality of a Power is not affected by the mere passage through its territorial waters of warships or prizes belonging to belligerents. (Article 10 of the Hague Convention of 1907 concerning the rights and duties of neutrals.)

Article 7. Ships which pass through territorial waters shall conform to the special regulations decreed by the littoral State in the interest and for the security of navigation or as matter of maritime police.

A neutral Power must apply impartially to the two belligerents the conditions, restrictions, or prohibitions made by it in regard to the admission into its ports, roadsteads, or territorial waters, of belligerent warships or of their prizes. Nevertheless, a neutral Power may forbid a belligerent vessel which has failed to conform to the orders and regulations made by it, or which has violated neutrality, to enter its ports or roadsteads. (Hague Convention, *ibid.*, Article 9.)

In the absence of special provisions to the contrary in the legislation of a neutral Power, belligerent warships are not permitted to remain in the ports, roadsteads, or territorial waters of the said Power for more than 24 hours, except in the cases covered by the present Convention.¹ (*Ibid.*, Article 12.)

If a Power which has been informed of the outbreak of hostilities learns that a belligerent warship is in one of its ports or roadsteads, or in its territorial waters, it must notify the said ship to depart within 24 hours or within the time prescribed by local regulations. (*Ibid.*, Article 13.)

A belligerent warship may not prolong its stay in a neutral port beyond the permissible time, except on account of damage or stress of weather. It must depart as soon as the cause of the delay is at an end. The regulations as to the question of the length of time which these vessels may remain in neutral ports, roadsteads, or waters, do not apply to warships devoted exclusively to religious, scientific, or philanthropic purposes. (*Ibid.*, Article 14.)

Belligerent warships may not make use of neutral ports, roadsteads, or territorial waters for replenishing or increasing their supplies of war material or their armament, or for completing their crews. (*Ibid.*, Article 18.)

Any act of hostility, including capture and the exercise of the right of search, committed by belligerent warships in the territorial

¹ The meaning doubtless is, legislation in force before the opening of the war. See the last "whereas" clause in the preamble of the Convention.

waters of a neutral Power, constitutes a violation of neutrality and is strictly forbidden. (*Ibid.*, Article 2.)

A neutral Power is bound to exercise such surveillance as the means at its disposal allow to prevent any violation of the provisions of the above articles occurring in its ports or roadsteads or in its waters. (*Ibid.*, Article 25.)

When a ship has been captured in the territorial waters of a neutral Power, this Power must employ, if the prize is still within its jurisdiction, the means at its disposal to release the prize with its officers and crew, and to intern the prize crew. If the prize is not in the jurisdiction of the neutral Power, the captor Government, on the demand of that Power, must liberate the prize with its officers and crew. (*Ibid.*, Article 3.)

QUESTIONS OF THE REPORTER.

1. How should bays be treated when on account of the extent of their penetration and the width of their openings they necessarily have rather the character of an interior than that of the high sea?

2. How should the islands be treated that fringe the coast of a country more than 3 marine miles therefrom?

3. How should banks more than 3 miles from the coast that become uncovered at low tide be treated?

4. And banks that remain always slightly submerged?

APPENDICES.

1. Regulations of the Institute of 1894 on the territorial sea, with the modifications adopted in 1895 by the International Law Association indicated in italics.¹

2. Convention of 1907, concerning the rights and duties of neutral Powers in case of maritime war.²

[No action has as yet been taken upon the preceding report.]

III.—Territorial Waters in Naval Warfare.

(a) General.

(b) Submarine cables.

(c) Submarine mines.

1. In general.

2. In straits.

[(a) General. In 1913 the Institute adopted a manual of naval war analogous to its Oxford manual of land warfare. Articles 1 and 88 have bearing on territorial waters.³]

ARTICLE 1. Rules peculiar to naval warfare are applicable only on the high seas and in the territorial waters of the belligerents,

¹ For this text, see *post*, p. 177.

² For the text of this Convention, see *post*, p. 499.

³ *Annuaire*, vol. 26, pp. 642, 665.

exclusive of those waters which, from the standpoint of navigation, ought not to be considered as maritime.

ARTICLE 88.—*Occupation: extent and effects.* Occupation of maritime territory—that is, of gulfs, bays, roadsteads, ports, and territorial waters—exists only when there is at the same time an occupation of continental territory by either a naval or a military force. The occupation, in that case, is subject to the laws and usages of war on land.

(b) In 1902 the Institute adopted the following rules on submarine cables in time of war:¹

1. A submarine cable connecting two neutral territories is inviolable.

2. A cable connecting the territories of two belligerents or two parts of the territory of one of the belligerents may be cut anywhere except in the territorial sea and in the neutralized waters appertaining to a neutral territory (“neutralized” by treaty or by declaration in accordance with Article 4 of the Paris resolutions of 1894 *ante*).²

3. A cable connecting a neutral territory with the territory of one of the belligerents can in no case be cut in the territorial sea or in the neutralized waters appertaining to a neutral territory.

On the high sea such a cable can only be cut if there is an effective blockade and within the limits of the line of blockade, subject to the repair of the cable within the briefest possible time. Such a cable can always be cut in the territory and in the territorial sea appertaining to enemy territory up to the distance of 3 marine miles from low-water mark.

In the debate leading up to the adoption of the foregoing rules the following discussion took place:³

The discussion is closed with respect to the high seas.

There remains the territorial sea of the enemy.

Mr. VON BAR distinguishes it from *national waters*, which are also called *national seas* or *maritime territory*. It is in these waters only, in his opinion, that cables can be cut. Mr. Holland proposes employing here the words “territorial waters,” which, in his view, comprehends the sea within 3 miles of the coast.

Mr. HARBURGER observes that the words “maritime territory” are opposed to “territorial sea.”

Mr. KEBEDGY recalls that the Institute has already fixed its terminology in the session of Paris, 1894. The proposal of Mr. Holland

¹ *Annuaire*, vol. 19, p. 331.

² *Ante*, p. 148.

³ *Annuaire*, vol. 19, p. 321.

to employ the expression "territorial waters", in distinguishing thereby a zone along the coast of 3 miles, is inconsistent with the Institute's vote at Paris, when it fixed upon *six miles* for the extent of the territorial sea.

MR. EDOUARD ROLIN supports the remark of Mr. Kebedgy. He thinks it means to point out that it is without any particular intention that, in the last articles of the regulations adopted at Paris, the words "territorial waters" were allowed to remain, and that this expression is employed there (Articles 7 and 8) as a synonym for "territorial sea;" that is to say, designate a marine zone extending *six miles* from the coast. This zone has the object of restricting sovereignty, and is not to be confused with the "maritime territory" making an integral part of the State and comprehends ports, inland bays, etc.

After this exchange of views, the PRESIDENT puts the following question to vote: "May a cable be cut without restriction in the 'maritime territory?'"

The proposition is unanimously accepted, and, further, the President puts to vote the following: "May cable be cut without restriction within the 'territorial sea'?"

A request for vote by roll call is made. The roll is called.

Yeas, 13. Messrs. Darras, Dupuis, Kebedgy, Lainé, Lehr, Lyon-Caen, Perels, Lord Reay, Renault, Stoerk, Strisower, Terao, and Sir D. M. Wallace.

Nays, 12. Messrs. von Bar, den Beer Poortugael, Descamps, Harburger, Holland, Toguin, Alb. Rolin, E. Rolin, Rostworowski, Streit, Westlake, and Pouillet.

MR. HOLLAND proposes to limit the territorial sea from this point of view at least to 3 miles on the sea.

The proposal is adopted by 13 fors; against, 4.

MR. E. ROLIN then takes up as a distinct proposition section 1 of the proposal that he had attached to that of Mr. Fauchille, but which after the rejection of the Fauchille proposition, nevertheless preserves its own usefulness and finds its place in the text. At the Paris session of 1894 it was decided that beyond the territorial sea, the neutral littoral State, in case of maritime war and from the special point of view of its neutrality, could extend the normal zone of the territorial sea. Desirous of harmonizing the President's text with the Paris rules, and proclaiming the purpose that seems to him the most interesting in this matter, Mr. Rolin files the following proposal:

A *submarine cable* connecting neutral territory with territory belonging to one of the parties at war can in no case be cut by one of the belligerents in territorial waters or neutralized waters appertaining to a neutral territory.

This proposal, on being put to vote, is adopted. A drafting committee is appointed to present a definitive text to the next meeting; members: Messrs. von Bar, Descamps, Holland, and Renault.

The meeting adjourned.

c. 1.—Submarine mines in general.

[At its Madrid meeting held in 1911 the Institute adopted the following rules on submarine mines:¹]

ARTICLE 2. Belligerents may lay mines in their own and in the enemy's territorial waters.

But it is forbidden even in these territorial waters:

(1) to lay unanchored automatic contact mines unless they are so constructed as to become harmless one hour at most after the person who laid them ceases to control them;

(2) to lay anchored contact mines which do not become harmless as soon as they are broken loose from their moorings.

ARTICLE 3. It is forbidden to make use, either in territorial waters or on the high sea, of torpedoes which do not become harmless when they have missed their mark.

ARTICLE 4. A belligerent is allowed to lay mines off the coasts and ports of the enemy only for naval and military purposes. He is forbidden to lay them there in order to establish or maintain a commercial blockade.

ARTICLE 6. A neutral State may lay mines in its territorial waters for the defense of its neutrality. It should, in this case, observe the same rules and take the same precautions as are imposed on belligerents.

The neutral State should inform shipowners, by a notice issued in advance, where automatic contact mines will be laid. This notice must be communicated at once to the governments through the diplomatic channel.

ARTICLE 7. The question of the laying of mines in straits is reserved, both as concerns neutrals and belligerents.

ARTICLE 8. At the close of the war the belligerent and neutral States shall do their utmost to remove the mines which they have laid, each Power removing its own mines.

As regards anchored automatic contact mines laid by one of the belligerents off the coasts of the other, their position shall be notified to the other party by the State which laid them, and each Power must proceed with the least possible delay to remove the mines in its own waters.

¹ *Annuaire*, vol. 24, p. 301.

The belligerent and neutral States whose duty it is to remove the mines after the war must make known the date at which the removal of the mines is complete.

ARTICLE 9. A violation of one of the preceding rules entails responsibility therefor on the part of the State at fault.

The State which has laid the mine is presumed to be at fault unless the contrary is proved.

An action may be brought against the guilty State, even by individuals, before the competent international tribunal.

[The Oxford manual of naval war adopted by the Institute in 1913 contains the following articles: ¹]

ARTICLE 21. Belligerents may lay mines in their territorial waters and in those of the enemy.

But it is forbidden, even in territorial waters:

1. To lay unanchored automatic contact mines unless they are so constructed as to become harmless one hour at most after the person who laid them ceases to control them.

2. To lay anchored automatic contact mines which do not become harmless as soon as they have broken loose from their moorings.

ARTICLE 22. A belligerent may not lay mines along the coast and harbors of his adversary except for naval and military ends. He is forbidden to lay them there in order to establish or to maintain a commercial blockade.

ARTICLE 23. When automatic contact mines, anchored or unanchored, are employed, every precaution must be taken for the security of peaceful shipping.

The belligerents must do their utmost to render these mines harmless within a limited time.

Should the mines cease to be under surveillance, the belligerents shall notify the danger zones as soon as military exigencies permit, by a notice addressed to shipowners, which must also be communicated to the governments through the diplomatic channel.

ARTICLE 24. At the close of the war, the belligerent States shall do their utmost to remove the mines that they have laid, each one its own.

As regards the anchored automatic contact mines laid by one of the belligerents off the coast of the other, their position must be notified to the other party by the State that has laid them, and each State must proceed, with the least possible delay, to remove the mines in its own waters.

Belligerent States upon whom rests the obligation of removing these mines after the war is over shall, with as little delay as possible, make known the fact that, so far as is possible, the mines have been removed.

¹ *Annuaire*, vol. 26, p. 646.

c. 2.—Submarine mines in straits.

[In 1912 Mr. Edouard Rolin, reporter of the Fourth Committee, submitted the following report, which however has not yet been acted upon by the Institute, on the status of straits with especial regard to submarine mines:¹]

THE STATUS OF STRAITS WITH ESPECIAL REGARD TO SUBMARINE MINES

(a)—Report of Mr. Edouard Rolin

After extended discussion the Institute voted during the two sessions, of Paris in 1910 and Madrid, 1911, on the report of the undersigned, a project of "international regulations for the use of submarine mines and torpedoes."²

The Institute took up the examination of this delicate question at its Ghent session in 1906, and it has voted since that time several principles relative thereto on the report of Mr. Kebedgy.³

It is proper to remember that these fundamental principles on the regulation of submarine mines were voted by the Institute before the meeting of the Second Peace Conference, which took place in 1907, and that apart from the very considerable common basis between the principles affirmed in 1906 by the Institute and the convention relating to placing submarine contact mines, adopted in 1907 by the Hague Peace Conference, there exists a noteworthy difference between the system of the Institute and that of the Hague Conference in regard to the status of the *open sea*, where the Institute does not admit the laying of mines at all, while the Peace Conference has permitted the use of submarine mines on the open sea to a certain point (Article 1 of the Convention). That is to say, that as a whole the Institute makes the right of pacific nations prevail over that of belligerents, while the Peace Conference has given priority in this circumstance to the right of war.

In the discussions at Paris and Madrid one question was recognized as particularly delicate, touching the use of submarine mines: The question of the status of straits, and in consequence the Institute decided to reserve it and even voted a formal provision in this sense. This provision was the object of Article 7 thus worded: "The placing of mines in straits is reserved, both as concerns neutrals and belligerents."

However, at Ghent in 1906 the Institute had shown itself less hesitant and on the motion of Mr. Kaufmann the following text had been adopted as paragraph 2 of section 3 of the draft resolutions:

¹ *Annuaire*, vol. 25, p. 421.

² See *Annuaire*, vol. 23, p. 429, etc., vol. 24, p. 286, etc., and especially in vol. 24, pp. 301-302, the complete text of the resolutions voted at Paris and Madrid.

³ *Annuaire*, vol. 22, pp. 344-345.

"but neutral States can not place such mines in the passage of straits which lead into an open sea." It remains to be said that according to this text the restriction of the use of submarine mines in straits would refer only to neutrals and consequently leave entire liberty to belligerents.

As we said in our 1910 report, the 1907 Peace Conference being prompted by considerations that were political rather than juridical¹ did not write any provision relating to straits into the convention on mines.

Influenced by the Ghent vote, and in spite of the absence of action on the part of the Peace Conference, the undersigned reporter believed that he could introduce into a draft prepared in 1910, in anticipation of the Paris session, a more general provision than the temporary text adopted at Ghent, affirming in an absolute way the prohibition "against laying automatic contact mines in the passage of straits that lead into an open sea" (Art. 4, par. 2 of the draft, *Annuaire*; vol. 23, p. 203), but, as we have said before, the Institute preferred to reserve the question.

Nevertheless, after having finished at Madrid the preparation of the Regulation on submarine mines in which this question of the status of straits was especially reserved, the Institute, encouraged doubtless by the results obtained, decided to have the question of the status of straits studied especially as respects submarine mines and did me the honor to designate me as reporter.

The first question which came up for the examination of the reporter, after a new examination of the problem, was that of knowing what should be understood by strait, and it seemed quite certain that we ought to consider as straits only *natural* marine passages "leading into an open sea" (Ghent text) or better "between two open seas" (text proposed at The Hague in 1907).

It is well understood that the regulations will in all cases be applicable only to *natural* passages. We, therefore, exclude interoceanic canals such as Suez, Corinth, and Panama, which not being natural passages are subject to the applicable rules of domestic law or of conventional international law.

But all definition is perilous, and if we wish to be perfectly precise it would not be sufficient to say that by straits we understand "natural marine passages between two open seas"; for there immediately comes up the question, What may be the greatest width of this passage without its losing its character as a strait, and also where does the strait begin and where end, and in consequence where does the special status which we intend to apply come into existence?

Less still can it be said, with certain geographical dictionaries, that by a strait is meant a "narrow arm of the sea separating two

¹ *Annuaire*, vol. 28, p. 194.

pieces of land" or an "arm of the sea inclosed between two bodies of land" (Littré), for everything is relative as regards the narrowness or the degree of contraction of an arm of the sea, and, moreover, if it separates two tracts of land but is limited to serving as a means of communication between the open sea and the territorial waters, it would no longer be a strait in the sense in which we are using the word.

If we tried to define it exactly it would therefore be necessary, besides the notion of "natural marine passage between two open seas," to see if there is a means of completing this definition as to the breadth and length of this arm of the sea that should be considered a strait and therefore subjected to the regulations contemplated for straits in regard to the use of submarine mines.

Now, if we consider the width of the natural marine passages that are considered as straits in usual geographical language, we see that these arms of the sea have the most variable widths, from a kilometer for the Little Belt and the Bosphorus, for example, up to 180 kilometers for the Strait of Korea between Korea and Japan.¹

It is quite as difficult to give a precise rule for the length of straits; that is to say, to determine where a strait begins or ends, and consequently where the special status takes its rise and would be applicable to it as regards submarine mines.

As a consequence of what precedes, we believe that we should conclude that it is necessary to leave to practice and international conventions the care of settling what arms of the sea shall be considered as straits and what their extent, and to abstain carefully in the text of general regulations from any definition that is too precise. It will suffice to indicate that the status of straits is not applicable to interoceanic canals and that it only applies to marine passages between open seas.

This being admitted, and before taking up the question of the status of straits as regards submarine mines, it is still necessary to take into consideration the fact that a certain part of straits among those that are the most traveled are already controlled by

¹The following are the widths, in kilometers, of the principal straits according to a table published by the Interparliamentary Union during the past year: Sound, 5 kilometers; Great Belt, 12 k.; Little Belt, 1 k.; Pentland Firth, 10 k.; North Channel (Ireland-Scotland), 22 k.; St. Georges Channel (Ireland-Wales), 80 k.; Pas de Calais, 34 k.; Strait of Gibraltar, 13 k.; Strait of Messina, 3 k.; Strait of Bonifacio (Corsica-Sardinia), 12 k.; Dardanelles, 2 k.; Bosphorus, 1 k.; Strait of Kertch, 5 k.; Strait of Babel-Mandeb, 22 k.; Strait of Ormuz (Gulf of Persia), 60 k.; Strait of Palk (Ceylon), 50 k.; Strait of Malacca, 40 k.; Strait of Sunda (Java-Sumatra), 20 k.; Strait of Korea (Korea-Japan), 180 k.; Strait of Shimonoseki (Kiu-Shu-Nippon), 3 k.; Strait of Tsuruga (Nippon-Yesso), 20 k.; Strait of La Perouse (Yesso-Sakhalin), 40 k.; Strait of Torres (Australia-New Guinea), 160 k.; Strait of Magellan, 10 k.; Mona Passage (Porto Rico-Haiti), 120 k.; Windward Passage (Cuba-Haiti), 90 k.; Yucatan Channel, 210 k.; Strait of Florida, 120 k.; Strait of Cabot (Newfoundland-Cape Breton), 120 k.; Strait of Belle Isle (Newfoundland), 20 k.; Strait of Juan de Fuca (Vancouver Island), 15 k.

particular rules resulting from international agreements. Such is the case not only with the Dardenelles and the Bosphorus, which are the subject of general conventions,¹ but with certain other straits that are the subject of particular conventions. It is evident that these conventions will remain in force notwithstanding the proclamation of certain general rules on the use of submarine mines, especially as these new rules impose stricter obligations upon the interested parties.

Subject to these several reservations, we can now study what general rules would be appropriately admitted into international law as regards the laying of submarine mines in straits which we confine ourselves to defining as "arms of the sea serving as a natural passage from one open sea to another open sea."

Is it necessary to assimilate in this matter the régime of straits to that of territorial waters to the extent to which the Institute and Peace Conference permitted the use of submarine mines? We consider such an assimilation as inadmissible and we even think that the régime of straits, as regards the parts of these arms of the sea that are contained within territorial waters, ought to be excepted in the general interest from the régime of those waters.

There is indeed a dominating general interest; it is that of universal commerce, and this applies as well to neutrals even for the defense of their neutrality as to belligerents.

This interest of universal commerce, which is that of the human race, requires that in straits pacific navigation be never stopped nor seriously hampered, and that consequently neither neutrals nor belligerents, even though littoral, may place submarine mines there.

Of course in formulating this principle we have not in view the purely temporary obstacles that might result from acts of war, such as a naval combat. We have here only to deal with submarine mines and in our opinion they ought to be absolutely prohibited in straits under any form at all in view of the permanent danger resulting therefrom in navigation, and consequently in universal commerce.

We might, where needful, make an exception to this rule of prohibition as regards certain straits which have not the character of passages *necessary to universal commerce*. Such for example would be the case of St. George's Channel situated between two parts of the same country, which international navigation may avoid in going by way of the ocean by the North Sea. Moreover, the question arises whether these passages, and especially St. George's Channel, 80 kilometers wide, are true straits; but that is a question of fact

¹ Treaty of London, July 13, 1841, of Paris of Mar. 30, 1856, and the Treaty of London of Mar. 18, 1871.

or convention that we have already renounced clearing up by a general rule.

Of course what we say above ought by no means to affect the right of littoral nations to fortify straits if they deem fit. That is a question absolutely distinct from the subject of this report.

In concluding the above considerations we think we may propose to the Institute the adoption of an article additional to the draft regulations on submarine mines. This article, which would take the place of Article 7 of the regulations, by the terms of which the question of the laying of mines in straits is reserved, would be worded as follows:

The laying of submarine mines is forbidden at any time, even in the territorial waters of straits; that is to say, in arms of the sea serving as natural marine passages from one open sea to another open sea.

ED. ROLIN, *Reporter*.

BRUSSELS, *July 10, 1912.*

(b) *Observations of Mr. den Beer Poortugael.*¹

THE HAGUE, *July 29, 1912.*

Mr. Secretary General.

HONORED COLLEAGUE: Having to-day received the report of Mr. Edouard Rolin on the "The Status of Straits with especial regard to Submarine Mines," I hasten to request that the observations I have to make upon them, and which you will find below, be brought to the knowledge of the members and associates of the Institute, as I shall be unable to be present at the Christiania session.

I agree perfectly with the reporter: That the right of pacific nations should prevail over that of belligerents. Universal interest requires that for merchant vessels there be free passage of straits uniting open seas; but universal interest by no means requires that this free passage be extended to belligerent warships.

It seems to me to be absolutely necessary to combine two preponderating interests, two elementary rights: (1) The universal interest in this pacific free passage, and (2) the vital interest and sovereign right of preservation belonging to every State and constituting a natural and essential element of the law of nations.

If a State is prohibited from laying submarine mines even in its own territorial waters in a strait, if therefore it is forbidden to it to make use of all means at its disposal for its defense and self-preservation, it is such a grave inroad upon its sovereign rights that it ought not to be attempted unless the other States, having the right and duty to guarantee the maintenance of the wise principles of the law of nations, give it in return an absolute guaranty that an adversary will not use this strait to the other's prejudice.

¹ *Annuaire*, vol. 25, p. 420.

It is therefore necessary to prohibit at the same time that adversary from coming there with his warships; in other terms, these passages being universally necessary for the peaceful life of nations, should be declared *neutral*, i. e., inaccessible in time of war to warships of nations other than those in possession of the two coasts. And in order that this guaranty be not chimerical, an international fleet of neutral nations, organized and provided in advance, should cause this neutrality to be observed.

Still another observation:

Mr. Ed. Rolin, so it appears, does not like definitions. If one can do without them, so be it; but as for me I must aver that I like generalities less. When we have recourse to them in order to avoid the inconvenience of a definition, we risk being engulfed in Charybdis in trying to avoid Scylla.

In the opinion of Mr. Rolin, the laying of submarine mines should be prohibited in straits under any form whatsoever.

It is true that he adds: "We might, when needful, make an exception to this rule of prohibition as regards certain straits which have not the character of passages *necessary to universal commerce*." The honorable reporter mentions his examples, "St. George's Channel and the North Channel;" nevertheless in passing from this concession he further lessens its value by saying, "But that is a question of fact or of convention which we have already renounced clearing up by a general rule."

It seems to me that this is more than a question of fact, that a question of principle is involved, and that if we wish to lay down a general prohibitive rule, it is absolutely necessary that it does not impose more than is intended to be prohibited.

In the wording proposed for Article 7 of the regulations, no account is taken of the scruples and reservations of the reporter who himself thought it had gone too far.

I therefore take the liberty of proposing to remedy this omission by modifying Article 7, as follows:

"The laying of submarine mines is prohibited at all times even in the territorial waters of straits that form a passage necessary to merchant ships over the customary marine route from one open sea to another open sea.

"These straits shall enjoy absolute neutrality."

I will explain.

In addition to the straits enumerated in the interesting note to the remarkable report, there is a multitude of straits especially in archipelagoes. There are some under the sovereignty of Turkey, Greece, Japan, and the Netherlands. In our East Indies we have, for example, besides the Strait of Sunda (between Java and Sumatra) the following:

| | |
|--------------------|----------------------|
| Strait of Lagoendi | (Sumatra-Lagoendi), |
| That of Madura | (Java-Madura), |
| That of Bali | (Java-Bali), |
| That of Sapudi | (Madoera-Sapudi), |
| That of Banka | (Sumatra-Banka), |
| That of Gaspar | (Banka-Billiton), |
| That of Karimata | (Billiton-Borneo), |
| That of Makassar | (Borneo-Celebes), |
| That of Moluccas | (Celebes-Halmahera), |
| That of Allas | (Lombok-Sumbawa), |
| That of Sumbawa | (Sumbawa-Flores), |
| That of Sapti | (Sumbawa-Kamodo), |
| That of Mangerai | (Kamodo-Flores), |

and several others between smaller islands in that archipelago.

In time of war the Netherlands, supposedly neutral, would, according to me, have to leave open for navigation the Strait of Sunda, the ordinary marine route, necessary but sufficient for merchant ships desiring to pass from the Indian Ocean to the China Sea; but they ought to have the right to close, in the need, the other passages in order to be able to fulfil their duties as a neutral State. It is impossible for naval forces to watch over all these straits extending for 500 geographical miles; and as these duties prescribe that they shall not tolerate passage across their territorial waters by belligerent warships, no other course is left them than to close to passage straits that are not strictly necessary for general commerce, by the use of submarine mines.

The same observation applies to archipelagoes under the sovereignty of other States.

The rules of international law should take them into account.

DEN BEER POORTUGAEL.

THE HAGUE.

THE INTERNATIONAL LAW ASSOCIATION.

[The International Law Association, which was originally called the Association for the Reform and Codification of the Law of Nations, was founded at Brussels, in a conference held on the 10th, 11th, and 13th of October, 1873. While the object of its foundation was the reform and codification of the law of nations, it has directed its efforts primarily toward popularizing questions of international law by public discussion, in bringing to bear on their solution the suggestions of practical men, and in formulating recommendations likely to have practical effect. As a result of these discussions resolutions have been adopted, or model rules of law or practice have been drafted, which in some

cases, have undoubtedly exercised an important influence on legislation in the various States.

The membership of the association is not limited to specialists in international law, but is open to men of any profession whatsoever who are interested in international affairs. Prominent men of all nations have taken part in its yearly deliberations, among them many members of the Institute of International Law, and other publicists of international fame.]

TERRITORIAL WATERS.¹

Mr. THOMAS BARCLAY, LL. B. (Paris), Secretary of the Special Committee on Territorial Waters appointed at the London Conference, 1887, presented the following Report:

The elucidation of this question has now made considerable progress.

The replies to the questionnaire issued by your Committee were published in our Report of 1893, and apart as a separate volume. Some of them were important contributions to our knowledge of the subject.

As convener of the Committee on the same subject of the Institute of International Law, I made ample use of that publication, as will be seen on referring to the second of my two reports to that body, copies of which are at the disposal of members.

The Institute, at its meeting last year in Paris, devoted the greater part of the session to the examination of the project of the Committee, which you will find at the end of my second report.

The chief point in my draft was to make a distinction of limit between fishery and other sovereign rights and neutrality.

As you are aware, no such distinction is made by international law as at present laid down by the text-book writers. They are agreed, however, that cannon-shot range from shore was the original basis of the existing three-mile rule, and they are also agreed that this distance falls very far short of contemporary cannon-range. There are thus practically two limits from shore known, at least historically, to international law for the determination of a State's jurisdictional zone seaward, viz., the distance within which the State can *de facto* exert its authority by the use of artillery on shore, and the other a fixed distance of 3 marine miles, which most States in practice apply.

These two distances being no longer identical, it has become a question whether there is not in reality a distinction of principle between them; whether the varying and uncertain cannon-shot limit can be a proper basis for sovereign rights; and, if it can not, whether, on the other hand, it may not have a juridical basis in respect of the right of the neutral not to be molested by acts between belligerents.

¹ The International Law Association, Report of the Seventeenth Conference held at Brussels, October, 1895 (London, 1896), p. 102.

When the modern idea of territorial waters came into existence, neutral States were protected against acts between belligerents within a distance which was the then cannon-range. Why should they no longer be protected within that range? No change has taken place in the opinions of men which would abridge the rights of neutrals. Quite the contrary.

My proposal, therefore, was to reaffirm the limit of cannon-range as the public law of Europe, but to confine its application to the right of the neutral as founded in reason.

The 3-mile limit has grown up more particularly in connection with fishery rights. This distance I at first proposed to retain, but the careful study of a voluminous Blue-book embodying the results of the inquiry by the Parliamentary Committee on British Fisheries showed that an extension of the limit was indispensable. The British Committee proposed that a new extended limit be fixed by international agreement, and to effect this recommended "that a proposition on these lines should be submitted to an international conference of the Powers who border on the North Sea." The distances proposed by the specialists examined before the Committee varied from 8 to 12 miles.

Important suggestions came also from other competent persons. Our member, Mr. Haynes, in his answers to our questionnaire, and at the subsequent London meeting, explained his 7-fathom depth system of fixing the limit of territorial waters.

Mr. Gordon and Prof. Weldon (Canada), in their replies to the same questionnaire, and Prof. Aubert (Norway), in his observations to the Institute, favored a system of two zones, an outer and an inner one, both jurisdictional, but with exclusion of foreigners from fishing within the inner one only.

The Institute, after much discussion in committee and at the plenary sittings, adopted the distinction I proposed, that is to say, that the range of cannon should in principle determine the width of the neutral zone; while for fishery and other sovereign rights there should be a fixed and stationary limit, which the Institute extended from 3 to 6 miles, *i. e.*, the greatest distance seawards which any European State at present lays claim to; within these 6 miles the adjacent State to be supreme in all things saving the right of peaceful transit, which belongs, by universal comity, to mankind generally.

The articles adopted by the Institute are as follows:¹

I submit these articles for discussion by the Association with the following modifications:

1. That the words "a right of sovereignty" in Article 1 be altered to "is sovereign." This was the original wording of the article, and

¹ For these articles see *ante*, p. 148.

the modification was hurriedly adopted by the Institute at the last moment without any real discussion. A perusal of the articles will show that the "sovereignty" of the adjacent State is absolute save in one particular, viz., the right of transit, and in this alone, and not a mere right of sovereignty.

2. That the 12 miles for bays in Article 3 be altered to 10 miles, which is the usual one adopted in fishery conventions. The doubling of the distance of 6 miles for bays seems to have been the result of a misunderstanding. The distance of 10 miles is only for the purpose of drawing a line from headland to headland; the territorial waters are measured seaward from this line as from the coast. The present distance of 10 miles gives satisfaction in all ordinary cases; and as the article contains, as it stands, a proviso for exceptional cases, it seems undesirable to go further in the alteration of a rule against which no complaint—complaint at least which would be satisfied by the addition of 2 miles—is made.

3. That the following clauses be added:

ART. 10. In straits whose coasts belong to the same State, the sea is territorial even though the spread of the coasts exceeds 12 miles if at the entrance of the strait that distance is not exceeded.

ART. 12. The part of the sea that is within the line of the beginning of the territorial sea forms part of the domestic waters of the littoral State.

These two additional articles explain themselves.

Mr. BARCLAY also presented a valuable paper, replying to the *questionnaire* issued by the Committee, received through the Norwegian Home Department from the Marine Department of the War Office of that State, since the date of his last Report.¹

Mr. BARCLAY then proceeded to move the adoption by the Association, one by one, of the rules already adopted by the Institute, with the amendments and additions suggested in his Report, as follows:

RIGHT OF SOVEREIGNTY IN TERRITORIAL WATERS.

ART. 1. The State has a right of sovereignty over a zone of the sea washing the coast, subject to the right of innocent passage reserved in Article 5.

This zone bears the name of territorial sea.

Mr. BARCLAY proposed the adoption of this rule, the phrase "The State is sovereign," being substituted for the phrase "the State has a right of sovereignty" on the grounds stated in his Report.

Sir WALTER PHILLIMORE expressed his preference for the phrase "a right of sovereignty," and referred to the opinion of the late Mr. Benjamin, Q. C., in support.

¹ For this paper, with covering letter, see *post*, p. 612.

Prof. CORSI seconded Mr. Barclay's motion, considering that the necessary reserve was contained in the exception of the right of in-offensive passage.

The PRESIDENT asked for an explanation of the precise meaning attached to the phrase "a right of sovereignty."

M. E. CLUNET said that the majority of the members of the Institute, who voted to substitute the phrase in the article for that of the project, did not consider that the right of sovereignty over the sea was precisely of the same character as that over the land. They therefore thought it would be going too far to give to the riverain State the extreme right of absolute sovereignty.

Mr. BARCLAY contended that Article 6 contained a clear declaration of the limitations of the sovereign right. The vote at the Institute was hurriedly taken on the question of redaction, without discussing the question of principle.

M. ÉDOUARD PICARD (Antwerp), on the other hand, moved as an amendment the insertion of the word "certain" ("a certain right of sovereignty"), thinking it desirable to point out more clearly that the right of sovereignty over territorial waters is a qualified right.

Sir WALTER PHILLIMORE seconded this amendment. The amendment, having been put to the vote, was lost by 6 votes to 7.

M. CLUNET then proposed, as a further amendment, the adoption of the rule as passed by the Institute of International Law. This amendment, having been duly seconded, was adopted by 11 votes to 4.

LIMIT OF TERRITORIAL WATERS.

Mr. BARCLAY proposed Article 2, without alteration, as follows:

ART. 2. The territorial sea extends 6 marine miles (60 to a degree of latitude) from the low-water mark along the full extent of the coasts.

The PRESIDENT suggested the desirability of adding words with reference to the limits of territorial waters outside the openings of bays.

Mr. BARCLAY accordingly proposed to insert after the word "mark" the words "or from the line mentioned in Article 3."

M. LANGLOIS (Antwerp) observed that this definition did not seem to be sufficiently precise, in view of the constant variation of tides.

Mr. DENT (Newcastle) replied that the ordinary spring tides were meant, and that the rule was well understood in this sense. He instanced the case of the Moray Firth as one in which the differences are great, but no difficulty is felt in applying the rule.

Prof. CORSI thought the rule sufficiently clear.

With the addition proposed by Mr. Barclay, the article was adopted *nem. con.*

LIMIT AS REGARDS BAYS.

Mr. BARCLAY proposed the adoption of article 3, as follows, but with the substitution of 10 for 12, on the grounds stated in his Report:

ART. 3. For bays, the territorial sea follows the sinuosities of the coast, except that it is measured from a straight line drawn across the bay at the place nearest the opening toward the sea where the distance between the two sides of the bay is 12 marine miles in width, unless a continued usage of long standing has sanctioned a greater breadth.

The article was adopted *nem. con.*

NEUTRAL ZONE MAY BE FIXED IN CASE OF WAR.

[Article 4 was adopted *nem. con.*]

RIGHT OF PASSAGE.

Mr. BARCLAY proposed article 5, as follows:

ART. 5. All ships without distinction have the right of innocent passage through the territorial sea, saving to belligerents the right of regulating such passage and, for the purpose of defense, of forbidding [*barrer*] it to any ship, and saving to neutrals the right of regulating the passage of ships of war of all nationalities through the said sea.

Sir WALTER PHILLIMORE asked what was meant by "*barrer le passage*," and suggested that it should be made clear that this provision was subject to those contained in article 10, with regard to narrow straits.

Mr. BARCLAY accordingly proposed to add at the end of the article the sentence: "This article does not affect the provisions of Article 10." The addition was adopted *nem. con.*

M. FRANCK (Antwerp) asked if it was intended by this article to give to neutral riparian States an absolute right of control in case of war.

Mr. BARCLAY replied by pointing out the difference between territorial waters as here referred to and the neutral zone mentioned in Article 4.

The article, with the additional clause, was then adopted *nem. con.*

CRIMINAL JURISDICTION EXCLUDED AS REGARDS FOREIGN SHIPS PASSING THROUGH TERRITORIAL WATERS.

Mr. BARCLAY proposed Article 6, as follows:

ART. 6. Crimes and offenses committed on board foreign ships passing through the territorial sea by persons on board of them,

against persons or things on board the same ships, are as such outside the jurisdiction of the littoral State, unless they involve a violation of the rights or interests of the littoral State or of its *ressortissants* not forming part of the crew or passengers.

Sir WALTER PHILLIMORE referred to the *Franconia* case, where the English judges were almost equally divided on the question whether the captain of a foreign ship, guilty of negligence on a foreign ship in British territorial waters, whereby a collision was brought about and the lives of passengers lost, could be held criminally liable in a British court. He inquired whether the rule was intended to cover such a case.

Mr. BARCLAY replied in the negative. Such cases were so extremely exceptional that it was thought unnecessary to provide for them in these articles.

The article was then adopted *nem. con.*

POLICE REGULATIONS TO BE RESPECTED BY PASSING SHIPS.

[Article 7 was adopted *nem. con.*]

JURISDICTION OVER FOREIGN SHIPS NOT MERELY PASSING—RIGHT OF PURSUIT IN CASE OF PENAL INFRACTIONS.

Mr. BARCLAY proposed Article 8, as follows. The first clause embodied an already recognized rule. The second clause was new; it proposed to apply the rule which already existed with regard to contraband of war to that which might be called contraband of peace.

ART. 8. Ships of all nationalities are subject to the jurisdiction of the littoral State by reason of the simple fact that they are in the territorial waters, unless they are only passing through them.

The littoral State has the right to continue on the high sea a pursuit commenced in the territorial sea and to seize and pass judgment on the ship which has committed a breach of law within its waters. In case, however, of capture on the high sea, the fact shall be notified without delay to the State whose flag the ship flies. The pursuit must be interrupted as soon as the ship enters the territorial sea of its own country or of a third Power. The right to pursue ceases as soon as the ship has entered a port of its own country or of a third Power.

The PRESIDENT expressed his approval of the proposal.

Mr. GRAY HILL pointed out that the rule would, if adopted as it stood, extend the jurisdiction to civil as well as criminal cases.

It was agreed to insert the word "*pénale*" (penal) after "*infraction*" (breach of law) to meet this objection; and with this modification the article was adopted *nem. con.*

SHIPS OF WAR EXCLUDED.

[Article 9 was adopted *nem. con.*]

SPECIAL PROVISIONS WITH REGARD TO STRAITS.

Mr. BARCLAY proposed Article 10, as follows, with the addition suggested in his Report:

ART. 10. The provisions of the preceding articles apply to straits whose breadth does not exceed 12 miles, subject to the following modifications and distinctions:

1. Straits whose shores belong to different States form part of the territorial sea of the littoral States, which will exercise their sovereignty to the middle line.

2. Straits whose shores belong to the same State and which are indispensable to maritime communication between two or more States other than the littoral State always form part of the territorial sea of such State, whatever the distance between the coasts.

3. Straits which serve as a passage from one open sea to another open sea can never be closed.

PROPOSED ADDITION.

In straits whose coasts belong to the same State, the sea is territorial even though the spread of the coasts exceeds 12 miles, if at the entrance of the strait that distance is not exceeded.

Sir WALTER PHILLIMORE supported Mr. Barclay's proposed addition, but suggested the substitution of "each entrance" for "the entrance."

Mr. BARCLAY accepted the suggestion, which was adopted *nem. con.*

M. PICARD suggested the addition of the words "They can never be barred" at the end of clause 2, and the substitution of the word "barred" (used in Article 5) for "closed" at the end of clause 3. These suggestions were adopted by the Conference.

The article, with these additions and modifications, was then adopted by 8 votes to 3.

STRAITS SUBJECT TO SPECIAL USAGES OR CONVENTIONS EXCLUDED.

[Article 11 was adopted *nem. con.*]

PROPOSED DEFINITION OF INTERIOR WATERS.

Mr. BARCLAY then proposed the following article, as an addition to those adopted by the Institute of International Law:

ART. 12. The part of the sea that is within the line of the beginning of the territorial sea forms part of the domestic waters of the littoral State.

Sir WALTER PHILLIMORE pointed out there was a right to enter into bays, the entrance of which might not exceed 10 miles, which this rule would interfere with.

After observations by the PRESIDENT, and explanation by Mr. BARCLAY,

Mr. DENT expressed the opinion that the rule was superfluous, and hoped it would be withdrawn.

Sir WALTER PHILLIMORE concurred.

Mr. BARCLAY accordingly withdrew the proposal.

The articles as a whole were then put to the vote, and adopted *nem. con.*, as follows:

RULES RELATING TO TERRITORIAL WATERS.

[NOTE.—The additions to and alterations of the Rules adopted by the Institute of International Law at Paris, in 1894, are indicated by italic type.]

ART. 1. The State has a right of sovereignty over a zone of the sea washing the coast, subject to the right of innocent passage reserved in Article 5.

This zone bears the name of territorial sea.

ART. 2. The territorial sea extends 6 marine miles (60 to a degree of latitude) from the low-water mark *or from the line mentioned in Article 3*, along the full extent of the coasts.

ART. 3. For bays, the territorial sea follows the sinuosities of the coast, except that it is measured from a straight line drawn across the bay at the place nearest the opening toward the sea where the distance between the two sides of the bay is 10 marine miles in width, unless a continued usage of long standing has sanctioned a greater breadth.

ART. 4. In case of war a neutral littoral State has the right to fix, by declaration of neutrality or by special notification, its neutral zone beyond 6 miles up to the range of coast artillery.

ART. 5. All ships without distinction have the right of innocent passage through the territorial sea, saving to belligerents the right of regulating such passage and, for the purpose of defense, of forbidding it to any ship, and saving to neutrals the right of regulating the passage of ships of war of all nationalities through the said sea. *This article does not affect the provisions of Article 10.*

ART. 6. Crimes and offenses committed on board foreign ships passing through the territorial sea by persons on board of them against persons or things on board the same ships are as such outside the jurisdiction of the littoral State, unless they involve a violation of the rights or interests of the littoral State or of its ressortissants not forming part of the crew or passengers.

ART. 7. Ships which pass through territorial waters shall conform to the special regulations decreed by the littoral State in the interest and for the security of navigation or as matter of maritime police.

ART. 8. Ships of all nationalities are subject to the jurisdiction of the littoral State by reason of the simple fact that they are in the territorial waters, unless they are only passing through them.

The littoral State has the right to continue on the high sea a pursuit commenced in the territorial sea, and to seize and pass judgment on the ship which has committed a breach of penal law within its waters. In case, however, of capture on the high sea, the fact shall be notified without delay to the State whose flag the ship flies. The pursuit must be interrupted as soon as the ship enters the territorial sea of its own country or of a third Power. The right to pursue ceases as soon as the ship has entered a port of its own country or of a third Power.

ART. 9. The peculiar situation of ships of war and the ships assimilated to them is reserved.

ART. 10. The provisions of the preceding articles apply to straits whose breadth does not exceed 12 miles, subject to the following modifications and distinction:

1. Straits whose shores belong to different States form part of the territorial sea of the littoral States, which will exercise their sovereignty to the middle line.

2. Straits whose shores belong to the same State and which are indispensable to maritime communication between two or more States other than the littoral State always form part of the territorial sea of such State, whatever the distance between the coasts. *They can never be barred.*

3. *In straits whose coasts belong to the same State, the sea is territorial even though the spread of the coasts exceeds 12 miles if at the entrance of the strait that distance is not exceeded.*

4. Straits which serve as a passage from one open sea to another open sea can never be *barred*.

ART. 11. The régime of straits actually governed by special conventions or usages remains reserved.

KENT: Commentaries on American Law. Fourteenth edition. Boston, 1896.

Volume I, page 26. Jurisdiction over adjoining seas.—The extent of jurisdiction over the adjoining seas is often a question of difficulty and of dubious right. As far as a nation can conveniently occupy, and that occupancy is acquired by prior possession or treaty.

the jurisdiction is exclusive. Navigable rivers which flow through a territory and the seacoast adjoining it, and the navigable waters included in bays and between headlands and arms of the sea, belong to the sovereign of the adjoining territory, as being necessary to the safety of the nation and to the undisturbed use of the neighboring shores. The open sea is not capable of being possessed as private property. The free use of the ocean for navigation and fishing is common to all mankind, and the public jurists generally and explicitly deny that the main ocean can ever be appropriated. The subjects of all nations meet there, in time of peace, on a footing of entire equality and independence. No nation has any right or jurisdiction at sea, except it be over the persons of its own subjects, in its own public and private vessels; and so far territorial jurisdiction may be considered or preserved, for the vessels of a nation are, in many respects, considered as portions of its territory, and persons on board are protected and governed by the law of the country to which the vessel belongs. They may be punished for offenses against the municipal laws of the State, committed on board of its public and private vessels at sea, and on board of its public vessels in foreign ports. This jurisdiction is confined to the ship; and no one ship has a right to prohibit the approach of another at sea, or to draw round her a line of territorial jurisdiction, within which no other is at liberty to intrude. Every vessel, in time of peace, has a right to consult its own safety and convenience, and to pursue its own course and business, without being disturbed, when it does not violate the rights of others. As to narrow seas and waters approaching the land, there have been many and sharp controversies among the European nations concerning the claim for exclusive dominion. The questions arising on this claim are not very clearly defined and settled, and extravagant pretensions are occasionally put forward. The subject abounds in curious and interesting discussions, and, fortunately for the peace of mankind, they are, at the present day, matters rather of speculative curiosity than of use.

Grotius published his *Mare Liberum* against the Portuguese claim to an exclusive trade to the Indies, through the South Atlantic and Indian oceans, and he shows that the sea was not capable of private dominion. He vindicates the free navigation of the ocean and the right of commerce between nations, and justly exposes the folly and absurdity of the Portuguese claim. Selden's *Mare Clausum* was intended to be an answer to the doctrine of Grotius, and he undertook to prove, by the laws, usages, and opinions of all nations, ancient and modern, that the sea was, in point of fact, capable of private dominion; and he poured a flood of learning over the subject. He fell far short of his great rival in the force and beauty of his argument, but

he entirely surpassed him in the extent and variety of his citations and researches. Having established the fact that most nations had conceded that the sea was capable of private dominion, he showed, by numerous documents and records, that the English nation had always asserted and enjoyed a supremacy over the surrounding or narrow seas, and that this claim had been recognized by all the neighboring nations. Sir Matthew Hale considered the title of the king to the narrow seas adjoining the coast of England to have been abundantly proved by the treatise of Selden; and Butler speaks of it as a work of profound erudition. Bynkershoek has also written a treatise on the same contested subject, in which he concedes to Selden much of his argument, and admits that the sea was susceptible of dominion, though he denies the title of the English, on the ground of a want of uninterrupted possession. He said there was no instance, at that time, in which the sea was subject to any particular sovereign, where the surrounding territory did not belong to him.

The claim of dominion to close or narrow seas is still the theme of discussion and controversy. Puffendorf admits that, in a narrow sea, the dominion of it, and the right of fishing therein, may belong to the sovereigns of the adjoining shores. Vattel also lays down the position, that the various uses to which the sea contiguous to the coast may be applied render it justly the subject of property. People fish there, and draw from it shells, pearls, amber, etc.; and who can doubt, he observes, but that the pearl fisheries of Bahram and Ceylon may be lawfully enjoyed as property? Chitty, in his work on commercial law, has entered into an elaborate vindication of the British title to the four seas surrounding the British Islands, and known by the name of the British Seas, and, consequently, to the exclusive right of fishing and of controlling the navigation of foreigners therein. On the other hand, Sir William Scott, in the case of the *Twee Gebroeders*, did not treat the claim of territory to contiguous portions of the sea with much indulgence. He said the general inclination of the law was against it; for in the sea, out of the reach of cannon shot, universal use was presumed, in like manner as a common use in rivers flowing through conterminous States was presumed; and yet, in both cases, there might, by legal possibility, exist a peculiar property, excluding the universal or the common use. The claim of Russia to sovereignty over the Pacific Ocean north of the 51st degree of latitude as a close sea was considered by our Government in 1822 to be against the rights of other nations. It is difficult to draw any precise or determinate conclusion, amidst the variety of opinions, as to the distance to which a State may lawfully extend its exclusive dominion over the sea adjoining its territories, and beyond those portions of the sea which are embraced by harbors, gulfs, bays, and estuaries, and over which its jurisdiction unques-

tionably extends. All that can reasonably be asserted is, that the dominion of the sovereign of the shore over the contiguous sea extends as far as is requisite for his safety, and for some lawful end. A more extended dominion must rest entirely upon force and maritime supremacy. According to the current of modern authority, the general territorial jurisdiction extends into the sea as far as cannon shot will reach and no farther; and this is generally calculated to be a marine league; and the Congress of the United States have recognized this limitation, by authorizing the district courts to take cognizance of all captures made within a marine league of the American shores. The executive authority of this country, in 1793, considered the whole of Delaware Bay to be within our territorial jurisdiction; and it rested its claims upon those authorities which admit that gulfs, channels, and arms of the sea belong to the people with whose lands they are encompassed. It was intimated that the law of nations would justify the United States in attaching to their coasts an extent into the sea beyond the reach of cannon shot.

Considering the great extent of the line of the American coasts, we have a right to claim, for fiscal and defensive regulations, a liberal extension of maritime jurisdiction; and it would not be unreasonable, as I apprehend, to assume, for domestic purposes connected with our safety and welfare, the control of the waters on our coasts, though included within lines stretching from quite distant headlands, as, for instance, from Cape Ann to Cape Cod, and from Nantucket to Montauk Point, and from that point to the capes of the Delaware, and from the south cape of Florida to the Mississippi. It is certain that our Government would be disposed to view with some uneasiness and sensibility, in the case of war between other maritime powers, the use of the waters of our coasts, far beyond the reach of cannon shot, as cruising ground for belligerent purposes. In 1793, our Government thought they were entitled, in reason, to as broad a margin of protected navigation as any nation whatever, though at that time they did not positively insist beyond the distance of a marine league from the seashores; and, in 1806, our Government thought it would not be unreasonable, considering the extent of the United States, the shoalness of their coast and the natural indication furnished by the well-defined path of the Gulf Stream, to expect an immunity from belligerent warfare, for the space between that limit and the American shore. It ought, at least, to be insisted that the extent of the neutral immunity should correspond with the claims maintained by Great Britain around her own territory, and that no belligerent right should be exercised within "the chambers formed by headlands, or anywhere at sea within the distance of four leagues, or from a right line from one headland to another." In the case of the *Little Belt*, which was cruising many miles from the shore be-

tween Cape Henry and Cape Hatteras, our Government laid stress on the circumstances that she was "hovering on our coasts"; and it was contended on the part of the United States that they had a right to know the national character of armed ships in such a situation, and that it was a right immediately connected with our tranquillity and peace. It was further observed, that all nations exercise the right, and none with more rigor or at a greater distance from the coast than Great Britain, and none on more justifiable ground than the United States. There can be but little doubt that, as the United States advance in commerce and naval strength, our Government will be disposed more and more to feel and acknowledge the justice and policy of the British claim to supremacy over the narrow seas adjacent to the British Isles, because we shall stand in need of similar accommodation and means of security.

It was declared in the case of *Le Louis*, that maritime states claim, upon a principle just in itself and temperately applied, a right of visitation and inquiry within those parts of the ocean adjoining to their shores. They were to be considered as parts of the territory for various domestic purposes, and the right was admitted by the courtesy of nations. The English hovering laws were founded upon that right. The statute (9 Geo. II, c. 35) prohibited foreign goods to be transshipped within four leagues of the coast without payment of duties; and the act of Congress of March 2, 1799 (c. 128, secs. 25, 26, 27, 99), contained the same prohibition; and the exercise of jurisdiction, to that distance, for the safety and protection of the revenue laws, was declared by the Supreme Court, in *Church v. Hubbard*, to be conformable to the laws and usages of nations.

KLÜBER: *Droit des Gens Moderne de l'Europe.* Second French edition, by Ott, Paris, 1874.

§ 130, page 180.—Within the *maritime territory* of a State are included those maritime districts or regions susceptible of exclusive possession, over which the State has acquired (by occupation or convention) and retained sovereignty. To these districts belong: (1) Those parts of the ocean which are adjacent to the continental territory of a State, in accordance with almost universally adopted opinion, as far as they are within the range of a cannon placed on the shore.¹ (2) Those parts of the ocean which extend into the con-

¹In a footnote Klüber states that these principles are uncontradicted in the Straits of Gibraltar, the English Channel, and the Pas-de-Calais. From 1806 to 1815 they also applied to the Straits of Messina, whose two shores belonged to different States. In many treaties a space of 3 leagues for the littoral sea is agreed upon. For example, Article V of the treaty of Paris of 1763 (although in another article, XV, 15 leagues

continental territory of a State, if they can be commanded by cannon from the two shores, or the entrance of which may be forbidden to vessels; that is, gulfs, bays, and creeks. (3) Straits which separate two bodies of land, and which are likewise within range of cannon placed on shore, or whose entrance or exit may be defended. There are likewise included among this number: (4) Gulfs, straits, and seas adjacent to the continental territory of a State, which, although not entirely within the range of cannon shot, are recognized by other powers as closed seas, subjected to the domination of one State.¹ (5) Those parts of the ocean contiguous to continental territory, in which vessels, either by nature or artificially, are more or less sheltered against tempests, and in which at will their entrance or sojourn may be forbidden, that is, roadsteads and ports. (6) Lakes entirely inclosed by the territory of a State.

DE LAPRADELLE: "The Right of the State over the Territorial Sea." In *Revue Générale de Droit International Public*, volume 5, 1898.

Page 264.—Territorial sea in its precise sense does not include harbors, roadsteads, and indentations whose opening upon the open sea is less than 10 or 12 marine miles² wide. Writers,³ treaties,⁴ the Institute of International Law⁴ are agreed in separating it from them. Doubtless not all writers are always as precise upon this point as desirable. Some teach that the territorial sea is calculated

is agreed upon); the treaty between France and Algeria of 1689 agrees upon 10 leagues from the French shores. That is why some authors regard the sovereignty over the space of 3 leagues as a general usage among the European powers. Klüber then cites the different theories, 60 miles, 100 miles, two days' journey, stone's throw, and range of cannon. Denmark claims sovereignty and ownership of the sea as far as 4 miles around Iceland and 15 around Greenland. On this matter a contest arose between Great Britain and the United Provinces. (See Moser's *Versuch*, VII, p. 677.) He then cites the treaty of October 20, 1818, and August 2, 1839, as fixing a distance of 3 miles from low-water mark.

¹ As examples of classes (3) and (4) Klüber cites the Great and Little Belt and the Sound, the Bristol and St. Georges Channel, the strait between Scotland and Ireland and the Irish Sea, the straits of Dardanelles and the Bosphorus, the Sea of Marmora and the Straits of Messina.

² For some, 10 miles; for others, 12. See *infra*, text, and notes.

³ The distinction is very clearly marked by Garels. *Institutionen des Völkerrechts*, p. 73; Harburger, *Der Strafrechtliche Begriff Inland*, p. 18 *et seq.*; Stoerk, in *Handbuch des Völkerrechts*, vol. II, pp. 414 and 460. These authors designate as territorial waters bays, interior seas, harbors, and roadsteads, and as coastal waters the territorial sea proper. In England, a like distinction between the waters of harbors, havens, bays, and the sea properly territorial. The act of 1879 (territorial waters act) calls the coastal sea of the Germans territorial sea; but certain writers wish to reserve to the former the name of territorial waters, and apply to the coastal sea only the name of jurisdictional waters. See Creasy, *First platform of international law*, p. 287. In France, the term territorial sea is constantly used (except Godey, *La mer côtière*). Bonfil-Fauchille, *Manuel de dr. intern. public*, No. 491, says littoral sea, but simply to distinguish this sea from the seas called closed and not from bays.

⁴ See *infra*.

in front of bays by starting from an imaginary line drawn in the sea, without excluding these bays themselves from the territorial sea.¹ But if the territorial sea is calculated at its usual distance starting from this imaginary line, is this not tacit affirmation that bays and roadsteads inside this line make no part of it? The best proof is that in order to measure bays at their openings, use is not made of the rule commonly employed for the strictly territorial sea, for which the distance is some three miles. The advocates of this system ought then to stop territorial bays at 6 miles of opening, that is to say the double, whilst on the contrary they authorize 10 miles.² This difference between the calculation of bays and that of the territorial sea appears in these very terms in the treaties. It is found notably in the fishery treaty of August 2, 1839, between Great Britain and France,³ in the unperfected treaty of 1888,⁴ which, negotiated by Great Britain with the Washington Government, unfortunately failed through rejection by the American Senate, and finally in the Hague Convention of May 6, 1882, signed by the countries bordering on the North Sea (Article 2);⁵ as regards bays, the distance of 3 miles shall be measured from a straight line drawn across the bay in the part nearest the entrance, at the first point where the width does not exceed 10 miles.

Different computation for territorial sea and for bays and recoil to the openings of the bays from the line of beginning of the territorial waters, these two characteristics, thus clearly set forth, define exactly the situation. Harbors, roadsteads and bays are a matter apart. They form part of what may be called the national sea, in order to express the idea that the waters that penetrate thus closely into the land form body with the territory and are associated with it in forming the country. The Institute of International Law, in its Paris session of 1894, clearly understood this:

For bays the territorial sea follows the sinuosities of the coast except that it is measured from a straight line drawn across the bay at the place nearest the opening toward the sea where the spread between the two sides of the bay is less than 12 miles, unless a con-

¹ Thus Lawrence, *Principles of international law*, 1895, p. 142; Hall, *International law*, edition 1880, sec. 41, p. 125-129; Pradier-Fodéré, *Traité de droit international public européen et américain*, Vol. 2, p. 147, who is particularly hostile to every distinction of this kind. See also Flore, *Le droit international codifié*, trans Chrétien, p. 225.

² Lawrence, *loc. cit.*; Wheaton, *International law*, Dana's ed.; Wharton, *International Law of the United States*, p. 305.

³ Hertslett, *Treaties*, vol. v, p. 89; Martens, *Nouveau recueil général de traités*, Vol. 16, p. 254; de Clercq, *Recueil des traités de la France*, Vol. 4, p. 497.

⁴ *British Parliamentary Papers*, United States, No. 1 (1888), and Lawrence, *loc. cit.* For the precedents, see Schuyler, *American diplomacy*, p. 404 et seq. (The work, although published in 1895, follows the fishery question only to 1886.)

⁵ *Journal du droit intern. privé*, Vol. 10 (1883), p. 101, and Martens, *Nouveau recueil général des traités*, 2d series, Vol. 19, p. 510.

tinuous and venerable usage has sanctioned a greater breadth (Article 3.).¹

This language does not permit a doubt that the Institute holds bays apart from the territorial sea. It affirmed this clearly a second time at Copenhagen (August 31, 1897). Whilst the territorial sea is placed "under a right of sovereignty" of the bordering State (Paris regulation, Article 1), "harbors, roadsteads, and bays form a part of the territory." (Projet of regulation on ships and their crews in foreign ports. Copenhagen, Article 2.)² Moreover, their juridical *régime* is distinct. In 1894, the project of the Commission affirmed that the right of passage created over the territorial sea did not exist on bays. This rule, laid aside in 1894 to be examined later, was not positively maintained at Copenhagen; nevertheless, the *régime* of harbors, roadsteads, and bays recognized at Copenhagen (1897) is quite different from that of the sea strictly territorial established at Paris in 1894. It is consequently permissible to conclude that the territorial sea, which starts from the coast opposite a straight littoral, begins to run from the imaginary junction of promontories which are opposite a littoral cut out by bays with insignificant opening.

Thus marked off at its point of departure, the territorial sea presents no tie with the territory from whose embrace it escapes. If this term territorial sea were applied to the portion of the waters which penetrate intimately into a country through bays, roadsteads, and harbors, it would find support in the nature of the case.³

¹ *Annuaire de l'Institut de droit international*, Vol. 13, p. 324. The projet of the Committee added: "The right of passage does not apply to waters inside this line" (*ibid.*, p. 292). Brought up later, this text underwent some modifications, notably at Copenhagen. See the following note.

² Regulations on the legal status of ships and their crews in foreign ports (August 31, 1897). Preliminary provisions. "Art. 1. The provisions of these regulations are applicable not only to ports, but also to inlets and closed or open roadsteads, to bays and havens which can be assimilated to these inlets and roadsteads. Art. 2. Said harbors, havens, inlets, roadsteads, and bays not only are placed under a right of sovereignty of the States whose territory they border, but also make part of the territory of these States." (*Annuaire de l'Institut de droit international*, Vol. 26, p. 231; Dupuis, *L'Institut de droit international*, Copenhagen session (August, 1897), in this *Revue*, vol. iv (1897), p. 772). At the Copenhagen session certain members were under the impression that at the Paris session even harbors had been understood under the term territorial sea. Messrs. Lyon-Caen and Ed. Rolin observed that that was a mistake, and their opinion prevailed. (*Annuaire de l'Institut de droit international*, Vol. 16, p. 187-189.)

³ On condition always of not exaggerating. The Zuyder Zee, claimed by Holland as her own, and from the extremity of which the territorial sea measures, by the general opinion, its classic distance, seems to us a sea quite apart, subject to the status of bays, because: First, it is a sea closed by a continuous line of islands, close together; second, it is a sea subject to the régime of lakes; it freezes over like them, whilst the sea resists freezing. So the claims of Holland in respect to the Zuyder Zee are generally admitted. (Sto: Gareis, *Institutionen*, p. 74; Lawrence, *op. cit.*, p. 141.) But one can not easily admit the claims of Phillimore (*Commentaries upon International Law*, vol. 1, sec. 189, p. 225, 2d ed.), of Kent (*Commentary on International Law*, p. 113), of Wheaton (*op. cit.*, Vol. 2, c. 4, secs. 7, 9), of Hall (*International Law*, sec. 41), on the King's or Queen's Chambers traditionally claimed since an edict of James I, in 1604, and carved out by imagin-

If the proximity of the marginal state modified merely the *régime* of the sea, without withdrawing from it its quality of *res communis*, the unity of the ocean would still be respected; broken by the land into roadsteads and bays of narrow access, but intact beyond, its great unity would not be affected.¹ Without regard to the suggestions of nature, the present day law of nations separates the territorial sea from the high sea to identify it with the national sea by placing it within the exclusive domain of the littoral state, whilst the high sea remains a common patrimony. Why thus separate from the open not alone the inner waters which are sheltered within the openings of the seashore, but the more distant waters which no bank encloses to protect from wind and wave? Why connect waters which nature distinguishes² to the scorn of a different assimilation which this same nature has so well established? The world repeats that the law of nations is a simple law, the enemy of fiction, that it frankly and without falsity follows nature without employing with her the artifice of pretorian methods.³ Why does doctrine, by this fiction of a sea which, without being held in the contraction of coasts, would have to be auxiliary to the territory of the marginal state and portion of its domain, thus break down the majestic unity of the ocean?

In assimilating the territorial sea to the coast waters of bays, harbors, and roadsteads, tradition obeys in a fashion more or less conscientious, the persistent authority of theories which it has rejected but of which it still preserves the impress. To understand this it is necessary to go back to the origins of the question of the seas. The Medieval Age did not see that they eluded States to form the patri-

ary lines joining from cape to cape the extremities of the promontories of England. The application has been made to the Bay of Fundy in spite of its great size. (Cf. Lawrence, *Principles*, p. 142; Walker, *Science of International Law*, p. 170, notes 3 and 4.) Much more admissible is the pretension of the United States to the Chesapeake and Delaware Bays, which they declare they possess in full ownership. (See in this sense: Ortolan, *Règles internationales et diplomatie de la mer*, Vol. 2, p. 163; G. F. Martens, *Précis de dr. des gens*, sec. 42; Kent, *Commentary on International Law*, Abdy's ed., pp. 113 and 114). But what shall be said of the boldness with which Kent wishes to apply to the United States the principles of the King's Chambers by giving them the Gulf of Mexico by a line drawn from Florida to the mouths of the Mississippi. (Cf. W. Schücking, *Das Küstenmeer im internationalen Rechte*, p. 20.)

¹ Be it understood, the sea is here considered only as its surface. On the changes which it presents on its bed, in its fauna and flora, see Boguslawski, *Océanographie*, and Thoulet, *Océanographie*, Paris, 1890, p. 441.

² Cf. de Lapparent, *Leçons de géographie physique*, 1896, p. 274.

³ It is in virtue of this principle that the pretended maxim, under which conquest was deemed retroactive, was rejected. (Cogordan, *De la nationalité dans les rapports internationaux*, p. 334.) It is well known to what error the notion of extraterritoriality, taken literally, leads in the matter of diplomatic immunity and many others. (Pietri, *De l'extraterritorialité*, Paris, 1895). Neither paper occupation (Salomon, *De l'occupation des territoires sans maître*) since the Berlin act of 1885, Article 34, nor paper blockade, Article 2 of the Declaration of Paris, is admitted. Finally, the theory of continuous voyages is swept away, even as to the contraband of war, because it rests upon a fiction. (Paul Fauchille, *La théorie du voyage continu en matière de contrebande de guerre*, in this *Revue*, vol. iv (1897), p. 304; Travers Twiss, *La théorie de la continuité du voyage appliquée à la contrebande de guerre et au blocus*, pp. 10 and 11.)

mony of humanity.¹ The ambition of sovereigns was to rule over them. As a defense against pirates,² merchant ships paid taxes to the maritime States that policed the waters.³ Venice levied in the Adriatic,⁴ Genoa in the Mediterranean, England in the North Sea, the Channel, and the ocean to the Bay of Biscay.⁵ Then, little by little protests arose against the abuse of these tolls. The overlordship of the seas by Princes was denied.⁶ It was then that the notion

¹ The Roman law laid down, on the contrary, that the sea "is *communis omnium naturalis jure*." See *Institutes*, II. 1, sec. 1-5; *Digest*, Lib. I, tit. 8, f. 5; Phillimore, *Commentaries upon international law*, vol. 1, p. 249; Creasy, *First platform of international law*, p. 225; Stoerk, in the *Handbuch des Völkerrechts*, vol. II, p. 487.

² "Piracy was universally practised during the early Middle Ages." (Cf. Hosack, *The law of nations*, p. 163.)

³ Hall has very luminously shown how, in the confusion of the ideas of protection and of sovereignty, was established the principle of proprietary ownership of the seas. (*International law*, 1880, p. 116.)

⁴ In 1269, Venice began to demand dues from all vessels sailing in the North Adriatic. Bologna and Ancona, after having tried to free themselves from it by arms, had to yield after an unsuccessful war. (Daru, *Histoire de Venise*, liv. V, sec. 21.)

⁵ In 1299, it appears from a memorial presented to certain commissioners sitting in Paris, to redress injuries inflicted on merchants of various countries by a French admiral in English waters, that procurators of merchants and marines of Genoa, of Spain, of Germany, of Holland, of Friesland, of Denmark, and of Norway, recognized in England "the exercise of sovereign dominion." (Boroughs, *The Sovereignty of the British Seas*, p. 27, and Hall, *International law*, p. 116.)

⁶ In the bulls of Alexander VI of May 3 and 4, 1493 (see Nys, in the *Revue de dr. intern. et de lég. comp.*, Vol. 27, 1895, p. 485), lands and seas were divided between the Spaniards and the Portuguese. Charles the Fifth styled himself: *Insularum Canariarum, nec non Insularum Indiarum et terrarum firmarum; maris oceani . . . rex*. (Selden, *Mare clausum*, cap. 27.) The pretensions of Portugal and Spain received a practical answer in the voyages of Drake and Cavendish and the commerce of Holland with the East. (Hall, *loc. cit.*, p. 117.) When Mendoza, the Spanish envoy, complained to Queen Elizabeth of the entrance of English vessels in the waters of the Indies, she refused to admit any right in Spain to deprive her subjects from freely navigating that vast Ocean. (See Hall, *loc. cit.*, p. 117, citing Camden, *History of Elisabeth*, year 1580, p. 328.) In 1602, a similar attitude on the part of England against the pretensions of Denmark at the Conference of Bremen. (Cauchy, *Le droit maritime international*, Vol. 2, p. 123.) Seven years after, in 1609, Grotius detached from a more general commentary, *De jure prædæ*, published, in 1604, his famous *Mare liberum*, to which Charles the First of England answered through Selden in a dissertation symmetrically styled: *Mare clausum* (1635). The disagreement between Grotius and Selden did not bear on the right of passage which Selden acknowledged, but on the right of fishing, the right to maritime honors of the flag, the right of neutrals to forbid naval war. With the concession by Selden of the right of passage, great progress was accomplished. In the other parts of his doctrine, the *Mare clausum*, after this first breach, gradually crumbled. The monopolies of fishing on the high sea were extinguished by purchase. In 1636, Holland obtained from England the exemption from licenses for fishing in the North Sea by the payment of thirty thousand pounds sterling. The right to salute, by which maritime sovereignty was symbolized, continued much longer. Its persistence caused in part the war of 1652, and furnished a pretext for that of 1672. In the treaties of Westminster of 1672 and 1674 (Hume, *History of England*, ch. LXV; Dumont, *Corps diplomatique*, vol. VI, 2, p. 74, and vol. VII, 1, p. 44 and 253), the United Provinces were obliged to recognize the right of salute in the British power in *ullis maribus a promontorio finis terrarum dicto usque ad medium punctum terrarum van Staaten dictarum in Norvegia*. The regulations of the English admiralty, up to 1805, preserved traces of these pretensions. But at the beginning of this century, Great Britain finally renounced them. Overcome successively in all parts of its economic domain, the thesis, so English, of *Mare clausum*, succumbed up to the point of *amour-propre* (Hall, *op. cit.*, p. 121 and seq.; Phillimore, *op. cit.*, vol. I, p. 247-256); Phillimore, *op. cit.*, vol. II, sec. 84, makes no more of the ceremonial than a question of courtesy. To complete this historical sketch, especially concerning the rôle of Louis XIV, of which the English writers do not speak in the matter of the salute, see Stoerk, *Das offene Meer*, in the *Handbuch des Völkerrechts*, vol. II, p. 488-492.

of the territorial sea was formed. The States which pretended to the sovereignty of the seas ceased to claim the more distant waters in order to hold to the nearer. In this way they assured the success of their pretensions by setting bounds to them; they made the levying of taxes easier in withdrawing it toward the coasts near which they could more easily cruise; they gave to their claim a new base in supporting it on the auxiliary character of the adjacent sea, and thereby strengthened their tottering thesis with a new argument; in short, they reserved to themselves to extend, following very elastic measures, the limits of the territorial sea by various methods agreeable to their interests. It is thus that England affirmed, under James I (1604) its rights over the near-by waters of King's Chambers with more energy than over the ocean, the Channel, and the North Sea.¹ It is thus the King of Denmark, after having put forth extraordinary pretensions to the waters between Norway and Iceland, consented at the representations of England and the Hanseatic towns² to restrict the prohibition of fishing to 15 miles from the coast of Iceland³ without extending it to the shore of Norway (1740). It is not the whole sea but the sea near the coasts which becomes then alone the object of sovereignty. The theory of the territorial sea serves thus as a support to the advocates of empire over the seas against the thesis born of the *Mare liberum* (1609). At the same time, before Grotius, those post-glossatores who, fed with Roman law,⁴ did not accept the appropriation of the entire sea, preserved for the Princes that part of the waters which, threading the shore like a river, can, like it, enter, according to the Roman law, into the bosom of the State.⁵ Departing from this principle. Bartolus, in his little treatise *Tyberiadis sive de fluminibus*,⁶ then in the fifteenth century. Fulgosius, Castro, Cæpolla, Felinus,⁷ finally Bodin,⁸ in his *République*, limited the right of the Prince to the

¹ Cauchy, *Le droit maritime international*, vol. II, p. 111. This work contains an excellent résumé of *Mare clausum*.

² Rymer, *Foodera*, vol. XVI, p. 433-434. See also: Phillimore, *Commentaries upon international law*, vol. I, p. 265-268.

³ In 1740, a Danish warship seized several Dutch ships on the ground that they had been found sailing and fishing within the prohibited zone. They were taken to Copenhagen, judged and condemned by the Admiralty Court, which caused very energetic remonstrance from the States General (Apr. 17, 1741). See C. Martens, *Causes célèbres du droit des gens*, vol. I, p. 359.

⁴ See *supra*.

⁵ The principles of the Roman law make an important distinction between seas and rivers from the view-point of ownership. The sea is "*communis omnium natural! jure*," but the rivers are "*publicae res, quarum proprietates est populi vel reipublicae*." (Creasy, *First Platform of international law*, p. 225.)

⁶ Bartoli *operae*, Lugdunum, 1552, vol. VI, p. 146.

⁷ See the citations in Tellegen, *Disputatio de jure in mare, imprimis in proximum*, Groningen, 1857, p. 13, and Schücking, *Das Küstenmeer im internationalen Recht*, Göttingen, 1897, pp. 6 and 7.

⁸ Bodin *De la République*, book I, chap. XI, ed. Paris, 1577, p. 215.

approaches to the coast, some to 100 miles, as Bartolus, others to 30 leagues, as Bodin, others less. In the conflict between political egoisms and the rights of humanity this idea of coastal waters became by degrees the important point of the two theses of appropriation and of community of the seas. Selden places them face to face with all their differences. But in practice his partisans have not always approached the problem with the same precision nor the same frankness. In order to secure toleration the policy of the *Mare clausum* hardly put forth a claim to coastal waters, except to give them greater extent. The question of knowing whether the sea should be open or closed has disappeared before that of knowing whether the territorial sea, alone closed, should be more or less in extent.¹ Instead of disputing in itself the possibility of a territorial sea, the advocates of the *Mare liberum*, to simplify their task, contented themselves with limiting it. Grotius does not deny its existence; he only restricts, as best he can, its limits.² His successors have since followed his system without perceiving that to place limitations on the thesis of Selden was but to preserve it.

Thus construed, contrarily to nature, on the foundation of a tradition outworn, the notion of the territorial sea has found its point of support in the necessities of the littoral State. The proximity of the sea exposes it, by opening its frontier to dangers against which it should be able to defend itself. Its position as a littoral State creates for it the same rights. From that it was but a single step to embody these necessary rights, without analyzing them individually, in the ancient notion of a dominion over the seas. That doctrine disposes of it without seeking to reconcile, beyond bays and roadsteads, the right of the state with the indivisible and altogether homogeneous character of the sea. It is accordingly agreed that the territorial sea is a thing apart, lopped off from the possession in common which is maintained over the outer open sea. But if agreement exists in this answer, it ceases as soon as a somewhat careful analysis seeks to fathom the problem. Often, writers refuse to;³ when they consent, their answers hesitate; their unanimity is destroyed. For Valin,⁴

¹ Stoerk, in the *Handbuch des Völkerrechts*, vol. ii, p. 452, declares that the *Mare clausum* and the *Mare liberum* only mask with the appearance of a juridical controversy, the struggle of two systems of commercial policy (that of protection and that of free trade). But at that time the notion of a closed territorial sea was sufficient, since it allowed to that alone to assure the victory of the protective system.

² *De jure belli ac pacis*, lib. ii, cap. iii, § 18.

³ Either through default of practical interest (Piédelièvre, *Précis de droit international public*, vol. i, p. 338), or by reason of the difficulties of the problem. Cf. the observations of Messrs. von Bar and Lammasch at the session of Paris (*Annuaire de l'Institut de droit international*, 1894, Vol. 13, p. 283 and seq.) and the answer of Mr. Desjardins (*eod. loco*).

⁴ *Notes sur l'ordonnance de 1681. De la pêche.*

Vattel,¹ Hautefeuille,² Pradier-Fodéré,³ Phillimore,⁴ Hall,⁵ the coastal sea is held to the littoral State by the bond of ownership, of which they deem it susceptible. For the great majority of writers,⁶ notably Bluntschli,⁷ Perels,⁸ Imbart-Latour,⁹ Wheaton,¹⁰ Halleck,¹¹ and quite recently also for Schücking,¹² the territorial sea, without being susceptible of ownership in a private sense of the word, is so in the international sense of sovereignty. The Institute of International Law accepts this system, with an indefinable shade of definition, by declaring the separate existence of a right of sovereignty, not of *the* right of sovereignty.¹³ Finally, von Bar,¹⁴ Harburger,¹⁵ Stoerk,¹⁶ Ortolan,¹⁷ Calvo,¹⁸ deem the word "sovereignty" too strong; over the coastal sea they allow to hover only a right less vigorous and more vague than jurisdiction. *Dominium, imperium, jurisdictio*; such are the three fundamental formulas.¹⁹ Thus the authority of the State over the territorial sea is weakened little by little in a diminishing progression. It has less and less to do with each of these system. No one yet dares to declare it *res nullius* or *res communis* like the entire sea. But it is felt that the present doctrine is out of place in the poorly

¹ *De droit des gens*, ed. Pradier-Fodéré, vol. i, p. 577.

² *Des droits et des devoirs des nations neutres en temps de guerre maritime*, vol. i, p. 51.

³ *Traité de droit international public européen et américain*, vol. ii, pp. 158 et seq.

⁴ *Commentaries upon international law*, p. 278. Phillimore, recalling his judgment in the *Regina v. Keyn* case, explains, however, that that dominion is confined to certain special objects.

⁵ *International law*, 1880, p. 126.

⁶ It may be said that this is the prevailing system, although according to Hellborn, *System des Völkerrechts*, p. 87, there is not here any prevailing system: "Von den verschiedenen Ansichten über dieselbe dürfte keine als herrschende zu bezeichnen sein."

⁷ *Droit intern. codifié*, sec. 802.

⁸ *Seerecht*, p. 41.

⁹ *La mer territoriale*, pp. 1 et seq.

¹⁰ *Elements du dr. intern.*, vol. ii, ch. iv, sec. 6.

¹¹ *International law*, vol. i, p. 134.

¹² *Das Küstenmeer*, p. 15.

¹³ *Annuaire de l'Institut de droit international*, Vol. 13.

¹⁴ *Theorie und Praxis des internationalen Privatrechts*, vol. ii, p. 612.

¹⁵ *Der strafrechtliche Begriff Inland*, 1882, pp. 1-9.

¹⁶ *Handbuch of Holtzendorff*, vol. ii, pp. 458-470.

¹⁷ The State has over this space not ownership, but a right of empire, a power of legislation of surveillance, and of jurisdiction. (*Règles de la mer*, vol. ii, ch. 7 and 8.)

¹⁸ "States have not over the territorial sea a right of ownership, but only a right of surveillance and of jurisdiction." (*Le dr. intern. th. et prat.*, vol. i, sec. 356.)

¹⁹ The three notions of ownership, sovereignty, and jurisdiction are definitely separated, although a large number of writers confuse them by uniting the two systems of ownership and sovereignty. It is not rare to see the partisans of ownership make use indiscriminately of the terms ownership and sovereignty (Pradier-Fodéré, *op. cit.*, vol. ii, pp. 158 and 163, note 1), or even to oppose at the same time to their opinion the theory of sovereignty or jurisdiction. (Hall, *International Law*, 1880, p. 126, note 1.) There is here a regrettable complication at the very threshold of the fundamental discussion. However, in taking account of the arguments rather than the formulas, let us list opinions on this point in three groups: (1) System of ownership, which gives to the State over the territorial sea the double quality of sovereign and an inherent proprietor to the possessions of the State within the limits of its frontiers; (2) system of sovereignty, which is distinguished from the preceding by not considering the sea as susceptible of appropriation, without departing from it in its practical consequences except perhaps in what concerns fishing, a monopoly in which awakes with special force the idea of ownership, while the idea of sovereignty leads directly to its mere regulation; (3) system of "power of legislation of surveillance, and of jurisdiction," which is con-

drawn outline which tradition furnished for it. The continual diminution of the authority of the coast in each of these systems shows well what is the tendency and what will be the certain outcome of this evolution of ideas. There is need of a term which, while respecting the littoral State's interest of proximity, may leave to the territorial sea the same condition of *res communis* as to the sea properly so called. In granting to the littoral State some simple coastwise servitudes, for the purpose of safeguarding its interests without trespassing on the possession in common of the sea, might one not essay to solve efficaciously this delicate problem?

I

Why understand the right of the neighboring State over the territorial sea as a right of ownership? Several special causes explain it. To justify the monopoly of fishing, claimed by the littoral State as an important source of profits, it was necessary to subject the territorial sea to a right stronger than sovereignty. The sovereign State, invested with public power, has doubtless the right to regulate fishing; the State that is owner of the sea, invested with the attributes of dominion, alone has the right to reserve it for its own profit. Besides, Selden having maintained that the sea is susceptible of ownership,¹ writers who saw in the territorial sea a happy compromise between the two theses, a closed sea and a free one,² were inclined to give to this sea, with Selden, the character of an object of ownership. These two reasons led Valin, in his notes on the Ordinance of 1681,³ to characterize by the word "property" the right of the State over the territorial sea, in the chapter where he deals with fishing after having referred to the opinions of Selden and declared that they are proper for that part of the ocean which washes the coasts. It is under the same influence that English authors,⁴ the successors of Selden, show themselves particularly favorable to the idea of an ownership which they seek to prove by invoking precisely this existence of the right of fishing on the coastal sea. One reason, a practical one: The fisheries for the bordering States. One reason, an historical one: The lingering remembrance of the theories of Selden. Such are the two causes which explain this system. But, when analysis takes it up, it fails the test.

founded with the second (Hall, *loc. cit.*), but which is quite distinct from it because it gives to the State not sovereignty, but a right *sui generis* made up of detached attributes of sovereignty. Under reserve of these observations, there is consequently room to distinguish the three formulas which we have indicated. In this sense, see Schücking, *Das Küstenmeer im internationalen Rechte*, p. 15. Heilborn distinguishes the right of ownership, the right of empire, and the right of legislation, police and jurisdiction by three distinctly different definitions. (*System des Völkerrechts*, vol. 1, p. 37.)

¹ See the theory of Selden, in Cauchy, *op. cit.*, vol. 14, p. 111.

² See *supra*.

³ *Notes sur l'ordonnance de 1681. De la pêche.*

⁴ Notably, Hall, *International Law*, p. 126.

To justify it, it may be said that the territorial sea is auxiliary to the territory itself and like it susceptible of ownership in virtue of the principle: *Accessorium sequitur principale*. But the territorial sea can so little follow the territory that differing from this latter, susceptible of individual ownership for the profit of some one person, it would never support an ownership other than that of the state. Why, moreover, would the territorial sea be auxiliary to the territory rather than to the high sea? The advocates of ownership are themselves obliged to recognize how futile such a reason would be.¹ Will it be said that the territorial sea, as a conquest of the waters over the land of the neighboring state, ought to belong to it in the way of compensation, as the water of a river belongs to an individual into whose land said river has worn its way?² Subtle reasoning. It fits strictly to the King's Chambers, cut out by the tides from the mass of the land. But how apply it opposite straight beaches which the sea does not indent? Some believe that it can be more easily proved, by a regular demonstration, that the territorial sea is an object of ownership. "Three conditions are necessary: (1) The object should be useful; (2) of such a nature that use by several injures him who is the assumed proprietor; (3) it should be reduced to the actual and material possession of the owner. Now the territorial sea unites these three conditions." That is the assertion.³ It is not exact. The territorial sea is useful, but the high sea is equally so, for fishing and for commerce; use of the territorial sea by several interferes with the use of a single one, but this is also true of the high sea, whose products are not more inexhaustible,⁴ as all nations attest by regulating more and more fishing on the open sea, in order to assure the conservation and reproduction of the species. If these two characteristics are sufficient to determine the object susceptible of ownership, nothing presents itself to distinguish the high sea from the territorial sea, which would be thus, like the high sea, under the common proprietorship of all the states. Finally, if all property rests on the exclusive power of withholding it, how would the littoral State better exercise it on the territorial sea than on the high sea? On the one as on the other, no stable position can be fixed; the only way of occupying it is to send ships there; the territorial sea consequently is occupied in the same way as the high sea; there is no difference in this

¹ Pradier-Fodéré, *op. cit.*, vol. II, p. 158.

² Let us hasten to say that we have not found this reasoning anywhere, although it is not inferior to those that are customarily given.

³ Pradier-Fodéré, *op. cit.*, vol. II, p. 159 *et seq.*

⁴ July 1, 1890, a conference for the protection of maritime fisheries convened at London, called the attention of the governments to the decline in the North Sea fisheries. Cf. the proceedings of the Commission of Inquiry into the situation of the North Sea fisheries, Brussels, 1898. See also the proceedings preparatory to the Hague treaty of 1882 and the arbitral regulations of August 15, 1893, relative to seal catching in Behring Sea.

respect between them. Now the high sea is the common property of humanity taken together. Why then should it be otherwise with the territorial sea? Because the products of this sea are the necessities for the inhabitants of the coasts?¹ A peculiar argument which rests the right to property on necessity. Because the littoral state erects for this part of the sea protective works, lighthouses, beacons, buoys, which require compensation in ownership of the waters? But does it not find this compensation in the security which it gives to its own ships and in the reciprocity that it expects in this respect in foreign waters? Will one say that the littoral State alone can launch ships on the territorial sea? But all writers, except perhaps one,² deny it the right of occupying alone this maritime zone, by reserving to itself there the exclusive right to the navigation thereof. In vain will it be said that, from the coast, cannon can hold the territorial sea, while it could not hold the high sea and so it renders the first susceptible of an ownership that the second does not bear.³ Cannon, an arm of war, a means of protection, can sanction occupation already made and compel third parties to respect it; it can not create it. Will it be said finally that the territorial sea is disposed of in virtue of ownership, like every other portion of the territory?⁴ Quite the contrary, if the right of fishing is susceptible of a distinct cession, the whole of the territorial sea, with the attributes that it admits of, is not susceptible of a separate cession. Now international law does not know forced inalienability, except for *res communes*, which escape individual ownership by a person or by a State. The territorial sea therefore can in no respect be an object of ownership.

Lowering the pretensions of the littoral State a degree, the predominating theory recognizes that the territorial sea is not, any more than the high sea, susceptible of individual ownership. The State preserves on the coastal sea the same right as on the land. Simply sovereign of the territory, it is simply sovereign of the territorial sea. It is only when the notion of sovereignty, for a long time included in that of ownership, is disengaged from it that this system is clearly seen. The post-glossatores first gave it expression. Not being able to admit the existence of a privative right over the sea,

¹ Reason given by Pasquale Flore, *Nouveau droit international public*, trans. Pradler-Fodéré, vol. 1, p. 369.

² Klüber, sec. 76: "The state could not be accused of injustice if it prevented the passage of vessels over the sea under the cannon of its coasts."

³ Argument presented to the Institut de droit international in the Paris session, 1894 (*Annuaire de l'Institut de droit international*, Vol. 13). See Pradler-Fodéré, *op. cit.*, vol. II, p. 159.

⁴ "The right of the littoral state over the territorial sea is therefore a right of ownership, and therefore bordering powers deal with respect to the territorial seas as if they were their owners. They dispose of them by virtue of their sovereignty as they dispose of every other part of their territory." Pradler-Fodéré, *op. cit.*, vol. II, p. 169; and he cites examples which, relating to the suppression of dues on passage do not at all substantiate this affirmation, but are, quite on the contrary, foremost in correcting it.

because the Roman law does not tolerate it, they affirmed the existence of a right of justice, without daring to speak of a right of ownership, which the Roman texts forbid. This system is found in the fourteenth century in Bartole, who points it out briefly and clearly in a little treatise not well known, but interesting on more than one score: *De fluminibus seu Tyberiadibus*.¹ The writer naively relates that he saw in a dream an apparition which commanded him to write a dissertation on rivers, alluvial lands, and islands. It is under his inspiration that to the question "to whom belong the islands which emerge from the sea?" he formulates the following answer: He who holds jurisdiction over the territory adjoining the sea has like jurisdiction over the sea for a short distance; *qui habet jurisdictionem in territorio cohaerenti mari etiam in mari habet jurisdictionem in mari modico spatio*.² Bodin, in his *République*, does not claim for the littoral state ownership of the seas, but simply sovereignty, for to be sovereign is sufficient to tax the passage of ships, and it is there alone that he cares to establish, in his discussion under this heading, "some true characteristics of sovereignty" that "the rights of the sea belong only to the sovereign Prince, who can impose duties as far as thirty leagues from his land."³ Reproduced by Gryphiander in Germany (*Tractatio de insulis*⁴) and Loccenius⁵ in England, this doctrine is stated precisely by Grotius⁶ and Bynkershoek⁷ (1609 and 1703), when the use of ordnance, scarcely begun in the time of Bartolus, was developed. It is on the cannon that this system takes its stand at that time. To be sovereign is to have authority; but authority depends upon arms; now the cannon gives authority over the waters along the coast, as it gives authority over the land; therefore the State is sovereign of the coastal waters through the power of arms and the might of cannon. Such is the system which, thanks to the prestige of traditions, still persists nowadays, when the technique of armament and the theory of sovereignty nevertheless have been rebuilt from top to bottom.

The notion of the territorial sea was formed on the basis of cannon at an epoch when coasts were provided with guns for defense. To-day the defense of coasts rests on utterly different ideas. The forts established along the shore at intervals have been for the most part abandoned by the army and navy, deprived of ordnance, and sold by the administration of the public domain. The defense of

¹ See *Bartoli operæ*, Lugduni, 1150, vol. v, p. 130.

² *Op. cit.*, p. 137.

³ Bodin, *Six livres de la République*, ed. Paris, 1577, liv. I, c. xl, p. 215.

⁴ Cap. XIV, *de jurisdictione insulae*, ed. Francfort, 1623, p. 162: "Jurisdictionem habens in continenti habet etiam in vicino mari."

⁵ *De jure maritimo*, Holmiae, 1651, p. 40: "Jurisdictionem autem habens in territorio vel districtu mari cohaerenti, habere existimatur in mari jurisdictionem usque ad duarum dierum iter."

⁶ *De jure pacis ac belli*, I, cap. iii, sec. 18.

⁷ *De dominio maris*, 1703, cap. ii: "Protestatem terrae finiri, ubi finitur armorum vis."

the coasts, secured formerly by cannon on the shore, is to-day secured only by the ordnance of cruisers. It is upon ships' guns that has now devolved the mission formerly assigned to coast guns. As a result, the littoral State can not truly claim, by virtue of its cannon, more rights over the territorial sea than over the high sea.

If the cannon of the coasts were a generator of sovereignty, why would not the cannon of warships be so likewise? To be sure, coast artillery can be fixed in a firm and stable fashion, sheltered from the caprices of the sea, whilst naval artillery, moving with the ship, displaced either by the vessel's evolutions or by the sea's caprice, does not offer the same guarantees of enduring. But how does that affect sovereignty? Is a sovereign less a sovereign because he reigns an hour instead of a year? To be a sovereign is to exercise the highest authority that it is possible for man to obtain. Now, if the ships on the high sea can not exercise it with their guns for a time as long as can the forts of the coast, that does not prevent their exercising the highest authority that the open sea can be susceptible of. Consequently, if the coast guns suffice to give sovereignty over the territorial sea, the guns of warships should likewise give it over the high seas. The only objection to the sovereignty of warships through the instrumentality of cannon is the impossibility for them to maintain their authority within the range of their guns when another warship, of a different nationality, approaches within cannon shot. Precisely because sovereignty is the highest authority possible, only one sovereignty can be established at the same time over one point. It being given that two like authorities exist simultaneously by means of their cannon, these two authorities can not be sovereign. The ship of war, therefore, does not carry along within the range of its guns the sovereignty of the flag. This is the great reason that opposes itself to the sovereignty of warships over the waters surrounding them. But let us suppose two coasts at cannon-shot distance from each other; do we not also have here two sovereignties established by their coast guns over the same sea? In granting to the coast guns a power generative of sovereignty, do we not at the same time come to the same absurdity as in attributing it to ships' guns? Why, then, would the state, which is not sovereign of the high sea by virtue of the guns of its warships, be sovereign of the marginal waters by virtue of its shore batteries, or more exactly by the potentiality that it has of placing cannon on its coasts? Finally, if the cannon is a generator of sovereignty, it is only on coasts where cannons are placed that sovereignty can act. Now in the majority of cases the cannon is lacking, and the option of placing it there no more suffices for sovereignty than the possibility of keeping a piece of land for 30 years, without actually occupying it, is sufficient for prescription.

Fundamental sovereignty is no more to be confused with the authority of guns than law is to be confused with fact. Formerly the notion of sovereignty was hidden in the rough envelope of force. To-day this notion is refined.¹

It is no longer the brutal authority of force that founds it; it is another principle that it takes for support. Modern law tends more and more to evolve the will as the basis of sovereignty; option and plebiscite in annexation, option in nationality when a conflict arises between soil and blood, development of suffrage in internal law, all attest that in modern public law the public will forms the base of sovereignty. To be sovereign is to have received from men grouped in the same body politic the right of expressing their collective will. The source of sovereignty is not in the cannon, but in the will of man. But it does not suffice to establish military force over a territory to become master of it; there is necessary the consent of those who hold it; it is for that reason that an invasion is not for the invader, an act clothing him with sovereignty. It is from the will of man, not from the brutal force of arms, that the right of the sovereign is evolved; and, if arms have some power, it is precisely because they are a means of acting on wills. It is by their wills that men organize sovereignty above them, as the sheaf of their collective wills. If the State is formed, it is by the will of those who compose it. If it assumes power over persons, it is because those persons consent. If it assumes authority over territory, it is because the owners of the territory consent. It is the will of men who, after having formed the State, give it sovereignty over their goods as over their persons. Nothing is under the authority of the State which is not at first under that of the individual. The will being the source of sovereignty, the State can not have under its sovereignty things which are not subject to the will of man. Now their will can only give it what they have, their persons, their goods, not things which elude that will itself. The sea, which is not under the

¹ To the time of Grotius and by Grotius himself (*De jure belli ac pacis*, I, ch. iii, sec. 7), sovereignty was considered as an actual power. Loyseau (*Traité des seigneuries*, II, No. 67), Bodin (*De la République*, ch. on *Souveraineté*) confused it with the pure notion of material power. This is the consequence of absolute monarchy and of theories of divine right. But later, with the notion of the social contract, these theories vanished. J. J. Rousseau attacks them: "I say that sovereignty is only the exercise of the general will." (*Contract social*, II, ch. i and iv.) Gierke characterizes sovereignty as the sanction of the general will enforced by public power. (*Die Grundbegriffe des Staatsrechts*, in *Zeitschrift für die gesamte Staatswissenschaft*, vol. xxx, p. 304.) For Lingg, the source of sovereignty lies in the conviction of those subject to the necessity of order (*Empirische Untersuchungen zur allgemeinen Staatslehr*, Vienne, 1890, p. 207.): "The supreme non-material force in a State is the general will. . . . It is a combination of the supreme material force with the supreme non-material force which produces the maximum of force in a given State. Consequently, one may say in a brief way, that 'sovereignty is the general will maintained finally by public force.' Sovereignty results from the cooperation of public force with the general will." (Combothecria, *La conception de la souveraineté*, in the *Revue du droit public et de la science politique en France et à l'étranger*, Vol. 8 (1897), pp. 245 and 272.)

private dominion of an individual, can not therefore be under the public dominion of the State. According to an idea often uttered by ancient writers, notably by Bodin,¹ who attributes it to Seneca, ownership and sovereignty are two phases, private and public, of the same object. Since in this place the private aspect is lacking, how could the public aspect exist?

Finally, it is a principle, almost universally recognized, that foreign vessels have the right of passage over the coastal sea, whilst foreigners can not penetrate by land within the frontiers of the State without its consent. All the definitions of sovereignty agree in recognizing that it has the exclusive power of commanding as a master.² Is it to command as a master on the coastal sea to be obliged to follow foreign vessels to pass? As Mr. Kleen said at the Paris session:

"There is a sovereign where there is not a sovereign; a State can object to what goes on on its territory; it ought to be able to do the same on the territorial sea."³ In vain it was replied, "that the right of sovereignty on the sea is not absolutely the same as that on the land" (Barclay).⁴ If this right is not absolutely the same, why, then, would it be the absolute right of sovereignty? In order to do justice to the sovereignty of the littoral State, Mr. Stoerk asks the Institute, which declares the State sovereign, to refuse the right of innocent passage of merchant ships in time of war. But if it is sovereign, why could it not refuse it in time of peace? As Mr. von Bar very well remarked, all the difficulty came from this, that "in the first article of the proposition, the Institute of International Law had called the right recognized by the bordering State, sovereignty." Sovereignty of the littoral State and right of passage of the third party can not be reconciled. The Institute thought it found a means of doing so by following Mr. Barclay in the observation that the right of passage is a servitude. Mr. Schücking took up the argument:

"The right of sovereignty on the coastal sea and the right of passage in time of peace for all ships can very well be reconciled. It is sufficient to consider this right as a servitude in public law."⁵ The argument is unacceptable because servitude of passage presupposes an enclave. If the free access of vessels is a servitude of

¹ *De la République*, ch. on *Souveraineté*, ed. cit., p. 215.

² "Sovereignty, being supreme over all, can not consist merely in certain rights of sovereignty. Limited, sovereignty would lose its very essence. To merit its name, sovereignty must be in a position to exercise every imaginable power" (Seydel, *Bundesstaatsbegriff*, in *Zeitschrift für die ges. Staatswissenschaft*, vol. xxviii, 1872, p. 190), "In conceiving the idea of sovereignty, one should understand that the state possesses in full power all imaginable rights of sovereignty." (Jellinek, cited by Comobothecra, *loc. cit.*)

³ *Annuaire de l'Institut de droit international*, Vol. 13.

⁴ *Eod. loco.*

⁵ Schücking, *Das Küstenmeer im internationalen Rechte*, p. 15.

other states upon the marginal sea, it is at the mouth of international rivers or in straits that it can be a servitude of passage, because there alone exists a sort of enclave. It is by this right that on international rivers free access exists for the benefit of other powers, because the use of the river is necessary to secure to the states traversed an exit to the sea. But how can be compared with this situation that of ships which sail the coastal sea, beyond straits and river mouths for long voyages at a time when they could as well pass farther out in the open? Will reply be made by pointing to harbors and roadsteads which, without opening like rivers and straits of communication toward other states, are nevertheless free of access?¹ But this free access is only reciprocal toleration; it is not a right. In short, it is a principle universally admitted that military harbors at least remain susceptible to closure.² On the other hand, nothing prevents the State from converting its commercial harbors into military ports, and by the same act closing to other powers points of access which they had formerly been able to occupy. Now, how can the will of the State, burdened with the servitude of access, cause it to disappear if there really is involved a right of third parties? We are therefore here in the presence of a simple sufferance. In the session at Copenhagen (1897) the Institute recognized it:

Exceptionally and for just cause, a State can forbid access by declaring its ports or some of them closed, notably to one nation in particular, as a measure of reprisal.

What does this say if not that ports are open, not because of a right, but a tacit agreement of reciprocity? Reserves exist in the case of access to national waters; according to the regulation of 1894,³ access to the territorial sea does not admit any reserve:

All ships without distinction have the right of innocent passage over the territorial sea.

Notice the difference in the statements. On the territorial sea there is "right of passage"; for harbors and roadsteads, an access "is open"; in law there is no longer a question. A harbor or coasting trade can be closed; a territorial sea can not be closed. In harbors and roadsteads, dues are demandable for the stopping and the stay (art. 5 of the Copenhagen regulation); in the territorial sea none can be levied. Impossible therefore to assimilate access in harbors and roadsteads to access upon the territorial sea. The first is a difference compatible with sovereignty. The second is a right

¹ Cf. the resolutions taken by the Institute of International Law in 1897, at the Copenhagen session, on the governing of ships in harbors and roadsteads (*Annuaire de l'Institut de droit international*, Vol. 16, p. 182, and Féraud-Giraud, *Régime des navires étrangers dans les ports*, in the *Journal du droit international privé*, Vol. 24, 1897, p. 53).

² *Eod. loco.*

³ *Annuaire de l'Institut de droit international*, Vol. 13, p. 324.

which can be established only by denying sovereignty. Such is the necessary consequence which no artifice of reasoning can diminish.

Thus the right of the littoral State over the territorial sea can not be sovereignty. The Institute of International Law has in view this impossibility when it recognizes simply *a* right of sovereignty for the coastal State over the sea.¹ It is an imperceptible shading which expresses the hesitation of the advocates of sovereignty concerning the value of their system. The older writers have often shown on their side the same scruples. They hesitate to attach to the right of the State the quality of sovereignty. For them it is a special and qualified right of justice; they do not speak of *imperium*, but of *jurisdictio*. They make this shade of difference more felt by taking care to underline it thus. Bartiole² does not speak of sovereignty but of jurisdiction. Gryphiander,³ in his turn, declares: *Jurisdictionem habens in continenti habet etiam in vicino mari*. Loccenius lays stress on declaring⁴ that two jurisdictions can co-exist on the same sea, while two sovereignties could not do so.

This theory has since been taken up and set forth by writers who only admit here a right of legislation, of police, and of jurisdiction, without mentioning a pure right of sovereignty.⁵ Obviously, this

¹ *Annuaire de l'Institut de droit international*, Vol. 18.

² *Bartoli operae*, ed. cit., p. 137.

³ *Tractatio de insultis*, p. 162, ed. Francfort, 1623.

⁴ *De jure maritimo*, ed. 1651, p. 40.

⁵ Harburger, *Der Strafrechtliche Begriff Inland*, p. 1-29; Stoerk, in the *Handbuch des Völkerrechts* of Holtzendorff, pp. 453-470; von Bar, *Theorie und Praxis des internationalen Privatrechts*, vol. II, p. 612. In order to reject sovereignty, these writers invoke three arguments: (1) Thus at the outset, the impossibility of reconciling with sovereignty the right of passage (Sic: Harburger), a reconciliation which the partisans of sovereignty seek by the hypothesis of the servitude of passage (Schücking, p. 16), an answer which we have disposed of. See text supra. (2) Thus is necessary the limitation of the rights of the bordering power to certain points of view, police, jurisdiction, etc.; to which the partisans of sovereignty reply that its right goes to the extent of giving it the islands which arise in the territorial sea; so the Island Anna, at the mouth of the Mississippi, was assigned by Lord Stowell to the United States, in spite of its occupation by an Englishman. (Schücking, p. 16.) We shall reply that Lord Stowell made this assignment on the single basis of the principle: *Quod vis fluminis de tuo praedio detraxerit et vicino praedio attulerit, palam tuum remanet* (Inst., lib. II, tit. 1, 1 and 21; the Anna La Porte, 5 Robinson, 373, Creasy, *First platform*, p. 235); but we refuse to see in the limitation of the powers of the littoral State to certain rights a positive argument, because, if the sovereign ought to be able to exercise all rights, it is not necessary that it does exercise all. (3) The third argument of this system (de Bar, loc. cit.) is that sovereignty resides in the possibility of an actual control (*die Möglichkeit einer faktischen Herrschaft*) which could not exist over the sea, even though territorial. To this argument Heilborn (*System des Völkerrechts*, p. 45) has justly replied that if the littoral State can not control the natural energies of the sea and hold them under its actual power, it can no more control the lava of the volcano, which does not prevent Italy from having sovereignty of the region of Etna. The law is a rule made for men and States in their relations with one another and not with the forces of nature: "Das Recht ist eine Norm für das Verhalten der Menschen bezw. Staaten zu einander, nicht für das gegenseitige Verhalten von Mensch bezw. Staat und Natur Kraft." We have taken into account these observations first while defining sovereignty; the greatest power that it is possible for man to establish, with exclusive title, over a given point; second, in placing the will of man at the foundation of the notion of sovereignty. Here is seen the whole difference which distinguishes our negation of the system of sovereignty from the ideas put forth by its first adversaries.

system is settled by this consideration, that the littoral State could not be sovereign of the territorial sea, to which it has not the right to close access. But if it is not sovereign, how would it have jurisdiction over it, which, always and everywhere, is the attribute of sovereignty? The objection has been made by Hall with much justice.¹ Outside the case of piracy, where all States have jurisdiction, without individually having sovereignty, on the high sea, the observation is exact.² To refuse sovereignty, and then to attribute jurisdiction, is a manifest contradiction.

Heffter is perhaps the only one who might escape this reproach, with this brief and luminous remark that "the police and surveillance of certain maritime districts, in the interest of commerce and navigation, have been intrusted to the nearest State."³ It is through this idea that the system of simple jurisdiction without sovereignty can escape the objection that we stated above. If the littoral State has only certain attributes of sovereignty, without having sovereignty itself, one may say that the sovereignty of the sea resides in the community of States as an international person,⁴ having the sea as its patrimony and delegating the exercise of its rights, sometimes to all the States, as that of the repression of piracy, sometimes to the nearest State, as that of police and jurisdiction in the territorial sea. It would be through delegation by a foreign sovereignty that the littoral State would exercise over the territorial sea the incomplete and fragmentary rights that have been by usage attributed to it. It has not the right of closing access thereto, because it is under the sovereignty of the association of States. It has the right of jurisdiction, police, and legislation, because its proximity gives it in this respect a quite special fitness, which carries to its own profit the delegation of the rights of this society.

There are here ideas which deserve special attention. At the threshold we would willingly say that the sea is susceptible of being the property of a person, as would be the international society of States. It will be less easily admitted that on the coastal sea the rights of this society are delegated to the littoral States. The reasons for hesitating are numerous: (1) As to piracy, this delegation does not take place; all have jurisdiction. How then, in other matters, would it be otherwise? Why a delegation to the littoral State upon

¹ Hall, *International Law*, 1880, p. 126, note 1.

² The reception in respect to piracy is explained elsewhere by the necessities of legitimate defense.

³ Heffter-Geffcken, *Le dr. intern. de l'Europe*, sec. 74.

⁴ We might add to this idea the personality of commissions such as that of the Danube, whose independent existence is explained because, created in the interest of the society of States, it participates in the personality thereof. There would thus be there, in a partial degree, a germ of a more complete personality. The day when all powers shall be admitted to vote the composition of that commission, what theoretically proceeds from the principles stated in 1815, that truth, up to that time thinly masked by the existing system, can not fail to stand out clearly.

one point, and not upon others? (2) With the hypothesis of the delegated right, the coastal State, as simple agent, should exercise every right transferred to it (legislation, jurisdiction, etc.) under penalty of losing the others. But how withdraw from it the benefit of the delegation, if it exercises in an imperfect or negligent manner the delegated power? (3) Besides, if one's mandate can be received by the will of the person, can it be received merely from the nature of things; that is to say, in the quality of littoral State? (4) Finally, the idea of the delegation is in itself inexact. The true source of the rights of the bordering State dwells not in the common interest of collectivity, but in the personal interest of the littoral State. Whilst it is disputed whether it has the right of justice, in which the interest of the society of States is indisputable, it is not doubted that it has the entirely personal right of exercising in the territorial sea the rights of customs police and of neutrality. Doubtful, when it benefits the society of States, its right becomes certain if it benefits itself. It is therefore not a delegated right. It is a personal right of its own.

The whole difficulty lies in characterizing this right. But, by means of elimination, this is now accomplished.

Page 309.—The littoral State, which is neither proprietor nor sovereign of the territorial sea, has only the right to impose upon the sovereign of the sea, the society of States, restrictions based upon the necessities of its own protection. Just as the owner of an estate may prevent his neighbor from planting trees to a certain distance, so as not to be injured in the use of his own estate, the littoral State has for its defense the right of limiting, near its coast, the free use of the sea. Just as it is not necessary in private law to be owner in order to have rights on an estate, so it is not necessary in public law to be sovereign to exercise some; thus it is explained that the littoral State has over the adjacent sea a right of its own, which is not a right of sovereignty. Besides, it is a principle that there are servitudes not conventional¹ which arise from the nature of things; thus is explained how the littoral State has over the neighboring sea a right which springs not from a special convention but from its very quality of marginal State. There is besides a principle that the servitude can not be ceded apart from the dominant estate; thus is explained how a State can not cede its rights over the coastal sea without also ceding its coast and vice versa. It is besides a common error in primitive legislation to confuse the abstract content of the right of servitude with the material object, *iter, actus, passus*;² thus is explained how in the beginning of the subject of the territorial sea they made a simple group of abstract rights of servitude, a concrete

¹ *Servitudes légales.*

² *Cuq, Institutions juridiques des Romains, p. 272.*

reality, in defiance of nature. It is in short a principle that servitudes not conventional exist only within the limit set by the necessities of proximity; but why give the littoral State, over the neighboring sea, rights broader than necessity requires? Why, unnecessarily, restrict the right of all for the profit of only one? And after that, why doubt that the term "territorial sea" is an inexact designation for a group of coastal servitudes, when we have only to enumerate them and measure their extent one by one in order to appreciate the consequences of that system?

II.

If the bordering State has over the coastal waters only a bundle of servitudes, a rule of interpretation results; it is that at the outset it is without right; where there is doubt, it is not a servitude that is presumed; it is liberty. To prove the existence of servitude, there is necessary either textual authority or necessity. The text here is not easily conceived of. The bordering State will therefore have the right to restrict as against another the free use of the sea only within the limits of necessity. It will have power to forbid naval war near its coast, in order to avoid the consequences of battle on its coast. It will have the right to impose upon vessels in the neighborhood of the shore customs surveillance, to protect itself against the opportunities that a sea frontier gives for smuggling. Finally, it will have the power to keep at a distance vessels from a place or State suspected from a sanitary point of view, to protect itself against invasion of epidemics. Therefrom results a triple obligation of nonapproach—military, customs, sanitary. It exists in all systems. What characterizes ours is, first, that it gives it special characteristics, and, second, that it limits the right of the littoral State over the territorial sea to this threefold relation.

First. *Special form of the rights of the littoral State.*—The right of the littoral State to the neutrality of the sea is not viewed in the same way in all the understandings of the territorial sea. If the coastal State has only a servitude in order to withdraw its coast from the effects of cannon in the offing, the belt of neutrality, taken on the sea, *res communis*, can not exceed the range of the cannon. If the adjacent waters are either under the ownership or under the sovereignty of the coastal State, the latter should be able to prevent belligerents, not only from entering these waters, but also from approaching them within cannon range, for it is within its right to protect, not only its coast, but its territorial sea, if, like the coast, that sea is its own. A belt of additional protection necessarily is added in his system to the belt of neutrality. On this point practice is at

variance. When, June 19, 1864, the *Alabama* left the port of Cherbourg to meet the *Kearsarge* in battle, the maritime authority allowed the combat at the limit of the territorial waters without pretending to push back farther the belt of neutrality.¹ In practice there has never been a pretense of doubling the territorial sea by a zone of protection. The Institute of International Law was unwilling to support this system.² To accept the theory of coastal servitudes upon the sea as a unity, without accounting for it, was to reject implicitly the theory of sovereignty over the territorial sea. In another aspect, opposite a wild and desert land, before natural rocks or uninhabited beaches,³ in the hypothesis of sovereignty, the master State of the coast has the right to forbid combat to another; but, conformably to maritime usage, as well as to the tolerance of mankind, if there is only a servitude for the sake of coastal protection, the absence of man or of buildings to defend against shells thrown from seaward, withdraws from him every right or preventing the battle.⁴ In the same category of opinions, the absence of cannon which, for Grotius and Bynkershoek, is equivalent to the absence of sovereignty, would not, if the shore is inhabited, prevent the coastal State from forbidding the battle, a solution as well in accord with the needs of mankind as with modern practice.⁵ Finally, it is only with the idea of the simple servitude that one can solve the difficulty presented when, pursued on the high sea, a belligerent ship enters the territorial waters of a neutral. Must it be disarmed? Yes, in the system of sovereignty, since it penetrates within the domain of the neutral; no, in the system of the coastal servitudes, because the sea, falsely called territorial, is not the possession of the neutral, but that of the world. Such is precisely the solution that practice gives and desires.⁶ But, how admit it when, on land, it is forbidden the enemy's troops to pass the frontier under arms? Why a different solution on the sea? The objection is a grave one for those who cause the frontier and the sovereignty of the bordering State to begin on the sea; for those who, on the contrary, throw back the territorial sea into the common domain of States the objection is not embarrassing, since the frontier does not begin with the territorial sea. For the same reason again, the neutral State can not prevent one of the belligerents from having its vessels pass through the territorial sea. Such is the traditional position of the writers. Kent⁷ considers maritime passage most innocent.

¹ Godey, *La mer côtière*, Annexe No. 2, L'*Alabama*, ses croisières, p. 163.

² *Annuaire de l'Institut de droit international*, Vol. 13.

³ The Kerguelen Islands, for example.

⁴ Ortolan, *Règles internationales et diplomatiques de la mer*. Vol. II, p. 24.

⁵ Godey, *La mer côtière*, p. 95 et seq. No difficulty on this point.

⁶ Only rare examples are cited to the contrary, notably that of the German schooner *Antinous*, in 1870, which, taken by the French, and commanded by them, was disarmed in the neutral waters of Heligoland. (Godey, *La mer côtière*, p. 104.)

⁷ *Commentaries*, p. 305.

Calvo,¹ Creasy,² deem it allowable. Mr. Kleen in his recent work (*The Laws of Neutrality*) protests.³ For him the passage through the territorial sea is unallowable, for he cannot admit passage through the territory of a neutral. But, while respecting the proper analogy of land frontier and of maritime frontier, it is allowable to reject this rule if it is admitted that the territorial sea, far from being, as Mr. Kleen says, under the sovereignty of the neutral, is beyond its frontiers. It follows that the neutral not only can, but ought to, leave free passage in the territorial sea to the warships that wish to proceed through it to the theater of hostilities.

Such are the particular consequences, accepted by theory and practice, in respect to neutrality and to which the hypothesis of coastal servitudes leads.

From the point of view of custom duties, in the system of sovereignty of the sea-bordering State, the frontier commences out at sea, and the duties should be collected as soon as the ship has penetrated within the territorial sea. On the contrary, under the rule of servitude, the tax is not yet demandable; only measures of general protection can be taken. It is precisely with this class of measures that customs laws stop. In France, the customs police make examination of ships in the territorial sea by inspection and *visé* of the manifests (papers in which the captain writes down his cargo without having the right to present more or less on his arrival); on ships of less than 100 tons, more formidable for fraud, they make a preventive examination; but the examination is not begun with real vigor and the dues are not demandable until the entrance of the ship within the harbors and bays.⁴ Sovereignty does not assert itself except over these last. It is a simple right of personal protection—that is to say, of servitude—that the State arrogates to itself in its own territorial sea.

Finally, in the sanitary point of view, to what consequences do we come, whether with the theory of sovereignty or with the rule of servitude? In the first case, the State preserves the right of rudely shutting the territorial sea against infected ships, which it may force to depart to the high sea, where the sick are cruelly tormented by rolling and pitching. When, in 1893, in Brazil, President Peixoto applied this measure to two ships of emigrants from Italy, there was a long discussion on the doctrine.⁵ And yet what more just, if the sea-bordering State has either ownership or sovereignty over the

¹ *Le droit international th. et prat*, sec. 1076.

² *First platform of international law*, sec. 349.

³ Vol. 1, sec. 119, p. 508.

⁴ Béquet, *Répertoire de dr. administratif*, v° Douanes.

⁵ Grasso, *De l'interdiction des ports d'un Etat pour raison sanitaire*, in the *Revue du droit public et de la science politique en France et à l'étranger*, vol. iv (1896), p. 43.

territorial waters? If it is master, it should be able to close access to them as soon as its interest requires it. In protesting against this proceeding the civilized world has, without saying so, departed from the old theory of the territorial sea. It has made an unconscious adhesion to the rule of coastal servitudes, for, if the sea-bordering State is sovereign of the territorial sea, it has the right to protect itself by thrusting back upon the high sea infected ships. But if the sea is common, the littoral State is obliged to receive suspected ships into the territorial waters and to seek its defense by the creation of quarantine stations, for these are sufficient for the needs, which alone establish its right to its sanitary protection. Here is seen how, in the threefold protection of the littoral, military, customs, and hygienic, the rule of coastal servitudes rises notably superior to that of sovereignty, by the practical justice and logical elegance of its judicial consequences.

By the shape that it gives these rights, the hypothesis is thus left fully to control its own results.

But what characterizes it is principally that it limits to the threefold point of view of neutrality, the customs protection and sanitary quarantine, the rights of the sea bordering State over the territorial sea. Thus there is no reason for that sea to make nationals *jure soli*, or to give jurisdiction either to the tribunals or to the laws of the littoral State, civil or penal.

Such are the consequences which result from this system, and which it is necessary to justify in order to prove the truth of the principle from which they flow.

Second. *Limitation of the rights of the littoral State.*—The territorial sea can not make nationals *jure soli*, since it is not included within the frontiers of the littoral State. But if this solution did not result directly from our principles concerning the territorial sea, it would proceed precisely the same from interpretations and principles relating to nationality.

After having been thought of as purely an effect of sovereignty, transmission of nationality by the soil, reconstructed altogether, must be to-day understood as an effect of the absorbing power of environment. The child at its birth is set in a double environment; the family first, and then the country where he lives. If these two environments are in harmony, he is unquestionably a national. If the family environment and the place environment are different, a conflict begins, doubt arises; for the interested one to determine it by his option, whether in favor of the country (art. 9 of the French civil code) or in favor of the family (art. 8-4°). Finally, if the family environment is itself for a long time under the absorbing action of the place environment, the soil takes the child from its

birth, without option granted, at the second generation (art. 8-3°).¹ With this reasoning, the *jus soli* represents the assimilating influence of the place. But how can the child born on the territorial sea be under absorptive action, moral and social, of the littoral state? In the first place, the child born on the land is under this action only while he lives there. It follows from the discussions of the civil code that the *jus soli* would have been done away with, if a distinction could easily have been made, in sincerity, between births during travel and births followed by sojourn.² Now, on the territorial sea, every birth occurs during traveling. On the land it is difficult to know whether the parents of the child are traveling or in the country only for a short time; on the territorial sea, the fact of traveling is obvious; the presumption that every birth in the country is followed by sojourn in the same country becomes too uncertain to be true; admissible strictly on land, it is not so on the coastal sea. On the other hand, in order that the child be nationalized by the soil, he must live where he is born³ under the influence of the ideas, manners, and customs which belong to the race and his native country; the *jus soli* is the consecration of the absorptive power of the place, from the moral and social point of view; but with what absorptive force can be endowed in this respect the nameless mass of water which has neither seasons, nor fields, nor houses, nor towns, and on the threshold of which expires the very source of patriotism? From the political point of view, the *jus soli* is based on the necessity of holding in the bounds of a fixed nationality strangers who live in the country with-

¹ De Lapradelle, *De la nationalité d'origine*, Paris, 1893, pp. 206 et seq. See also Gérardin, *Déclarations en vue d'acquérir la qualité de Français*, p. 92. With more reserve, M. Audinet wishes to recognize that "there is there an idea which the legislator of 1889 was able to discern, but without attributing to it an exclusive or even predominant importance." (*La nationalité française dans les colonies*, in the *Journal du droit international privé*, Vol. 25 (1898), p. 36) and, in order to show that this idea has not "an exclusive or even predominating importance," he invokes two arguments. "The proof is that, according to article 8-3°, the birth in France both of father and son confers irrevocably on the latter French nationality, although neither the one nor the other has ever resided in our country." In the second place, "this theory does not take account of the interest which the state has in conferring its nationality upon strangers born and settled on its soil, even when they would not be, in fact, impregnated with the French spirit." (Audinet, *loc. cit.*) To the first argument, we shall answer that there are in the *jus soli* these two presumptions: 1, That the child is reared where it is born; 2, that he is subject to the influence of the environment when he is reared in it. Theoretically, these two presumptions would have to undergo proof by contrary. They do not permit it in certain cases (8-3°). But the two presumptions always exist, even when they become irrevocable, for it is fundamental that such a character *juris et de jure* is attached to the presumptions without destroying them. To the second argument, we shall say that the political end of the *jus soli* ought not, however, to exclude all appearance of reason or of justice, without which one would wander into empiricism and arbitrariness.

² The son of an Englishman can become French, but will he be so simply because his mother, traveling in France, bore him on that foreign soil? See the discourse of Siméon, in Locré, *Législation civile*, vol. II, p. 248. Cf. the Chazal amendment, in Fenet, *Travaux préparatoires du code civil*, vol. VI, p. 346, and our *Nationalité d'origine*, p. 205.

³ This is the persisting point of view of successive legislators from 1851 and from 1889. See the demonstration in our *Nationalité d'origine*, p. 207-208.

out being subject to imposts.¹ But if these strangers are dangerous by their presence and by their example, when they can form compact and homogeneous clusters, what danger is there to fear from the same individuals who, born on the territorial sea, perhaps will never make a halt, either in any town or in any harbor of the bordering state? Finally, the *jus soli* presents, compared with the *jus sanguinis*, a certain theoretical and practical inferiority;² it produces through its opposition with it conflicts as numerous as annoying, whose solution is too often troublesome, not to say impossible.³ How then regret a conception of the territorial sea, which, in a precise way, allows these difficulties in this sea to be brushed away? This solution is so necessary that the very advocates of sovereignty do not always dare to forego it. Struck by the inconveniences of their theory, several refuse to its natural result by deciding that a child born on the territorial sea is not subject to the application of the *jus soli*. This is the rule admitted by W. Schücking. In Venezuela, where the law considers all natives as nationals, what interest could the state have in taking for such all children born of foreigners on board a vessel which only passes through the coastal waters of the country which they themselves have never dwelt in?"⁴ Schücking, in order to deprive the coastal sea of the *jus soli*,⁵ invokes here the extritoriality of ships, which he admits, like Rocco,⁶ even on the territorial sea. But if on the territorial sea the merchant ships benefit therefrom as on the high sea, it is not proof that the territorial sea escapes individual sovereignty like the open sea, exactly what we mean to prove? The child, born on the territory of a foreign embassy, is not considered born abroad. Why should the extritoriality of the ship have more force than that of the embassy?⁷ Created to insure order and discipline on ship board, how should this fiction

¹ See our *Nationalité d'origine*, p. 149 et seq.

² Berney, *La nationalité à l'Institut de droit international*, in the *Revue du droit public et de la science politique en France et à l'étranger*, vol. viii (1897), p. 25.

³ See our *Nationalité d'origine*, p. 339 et seq.

⁴ *Das Küstenmeer im internationalen Rechte*, p. 41.

⁵ Schücking, *Das Küstenmeer*, p. 43-44. "Die herrschende Lehre hat bisher diesen Wort (Extritorialität des Schiffes) auf Kauffahrtsschiffe im Küstenmeer nicht angewandt; zahlreiche Autoren konnten es nicht anwenden, weil sie nicht von der Souveränität des Uferstaats im Küstenmeer ausgingen. Thut man das jedoch, so rechtfertigt unseres Erachtens die Rechtslage diesen Ausdruck."

⁶ Rocco, *Diritto civile internazionale*, vol. II, 347 (Schücking, *loc. cit.*, gives it according to the translation of Pappafava in the *Journal du droit intern. privé*, vol. xiv (1887), p. 572). He also cites Morton P. Henry in his work: *The jurisdiction and procedure of the admiralty courts of the United States in civil causes on the Instance side*. See also, Hautefeuille, *Histoire des origines, des progrès et des variations du droit maritime international*, p. 59. Contra: Schlattarelli, *Del territorio nelle sue attinenze colla legge penale*, p. 21 et seq.; Flore, *Droit international codifié*, trans. Chrétien, art. 221, p. 128, and generally all writers. Cf. Phillipson's monographs, *Over den volkenregtelijken regel; schip is territoir*, Zwolle, 1864.

⁷ Pictet. *De l'extritorialité*, Paris, 1895.

have effect beyond this reason for order, in questions of nationality? It is better to say that if the *jus soli* does not belong to the territorial sea, it is that such a sea is not susceptible of sovereignty.

But then criminal jurisdiction, an attribute of sovereignty, ought no more to belong to the littoral state; for, not being sovereign, it can not police waters located beyond its frontiers. On the contrary, either under the system of full sovereignty or under the timid system of jurisdiction, it can accomplish this repression. But this consequence, which comes from the systems accepted in a fashion, so to speak, as necessary, is almost always and everywhere rejected. MM. Ortolan and Faustin Hélie,² logically to the prevailing system, admit it. In England it is the same system that has been accepted by the *Territorial Waters Act* of August 16, 1878,³ which bestows jurisdiction upon the British courts over criminal offenses committed up to 3 miles at sea.⁴ This is the system adopted by the Mexican Penal Code (Art. 189) and by the Portuguese Penal Code of September 16, 1886 (Art. 53). But the opinion of Ortolan and of Faustin Hélie is weakened by this fact that that jurisdiction over the territorial sea, by them copied from that of harbors, does not reach, conformably to the opinion of the Conseil d'État of October 28–November 20, 1806, criminal offenses committed among foreign crews, unless the general peace of the harbor be broken or the assistance of the local authorities sought. Moreover, the English system is equally limited by the circumstance that proceedings shall not be instituted except with the consent of one of the five Secretaries of State, and on his certificate that the institution of proceedings is expedient, which clearly means that they are not to take place except in exceptional cases. (*Territorial Waters Jurisdiction Act*, art. 3.) Finally, the Mexican code and the Portuguese code⁵ place to this system exceptions which the opinion of the Conseil d'État of 1806 sets to the broad doctrine of Faustin Hélie and of Ortolan.

¹ If extrterritoriality of the ship does away with the nationality of the coastal state, does it give to the child *jure soli* the nationality of the flag? As opposing this consequence, Cf. our *Nationalité d'origine*, p. 216–220.

² Ortolan, *Droit pénal*, 3d ed., vol. 1, p. 390, and Faustin Hélie, *Traité d'instruction criminelle*, vol. II, p. 506.

³ The German ship *Franconia* had in the Channel, less than a marine league from Dover, collided with the English ship *Strathclyde*. In this accident one of the latter's passengers perished. The jury rendered a verdict of guilty of manslaughter by negligence against the captain. But the judge suspended execution until the judgment of the court for crowned cases reserved. The latter dismissed the accused on the ground of lack of jurisdiction. It is then that a law was asked of Parliament. (Renault, *Annuaire de législation étrangère*, 1879, p. 69; Calvo, *Le droit international th. et prat.*, 4th ed., vol. 1, § 458, p. 560; Stephen's *Commentaries*, vol. II, c. XVI; Maine, *International law*, lecture II; Nelson, *Selected cases, statutes and orders*, p. 294, 296 *et seq.*; R. v. Keyn in *Law Reports*, 3, *Exchequer Division*.)

⁴ Francis Taylor Piggott, *Exterritoriality*, p. 8.

⁵ Lehr, *Le nouveau code pénal portugais*, in the *Revue de droit international et de lég comparée*, vol. XX (1888), p. 326.

Even thus reduced, this system is generally rejected. The bill of 1878 found adversaries everywhere.¹ In France, the opinion of the Conseil d'État has decided for harbors, to which may be assimilated roadsteads and small bays, that is to say the national sea. For the sea properly termed territorial, the text is lacking. The extension thereof becomes difficult, and as the local state would be unable to assume more authority over the territorial sea than over the national sea, it follows that it has no more authority at all. This is the opinion generally admitted. Sometimes, either in France or abroad, it has been attempted to except from this want of jurisdiction the offense which could be witnessed from the shore² or indeed collision between two foreign ships.³ In the first hypothesis, there is without doubt a regrettable scandal; but it is impossible to attribute jurisdiction to the coastal state merely because the crime has been seen from the shore, on account of the uncertainty of the criterion of eyesight and of the arbitrary distinctions to which it leads among crimes, according as they take place by day or by night, off a desert coast or off an inhabited one, under a cloudy sky or in clear weather.⁴ In the second hypothesis, that of collision between foreign ships, the doubt is more serious. It is to the interest of the state that its approaches be open without danger to foreign commerce and that the security of passage be maintained in its quarter

¹ Cockburn, C. J., declared at the time of the case of *Regina v. Keyn* that such a jurisdiction did not exist and that the three-mile limit was a fiction of writers on international law. Cited by Piggott, *Exterritoriality* (p. 8.) In England the bill was very severely criticised from the beginning, not only by members as Sir George Bowyer, in the House of Commons (*Hansard's Parliamentary Debates*, August 12 and 15, 1878), but by jurists, like Travers Twiss (*Law Magazine*, May, 1877), R. Phillimore (*Journal du droit intern. privé*, vol. iv (1877), p. 161-166), Woolsey (*Introduction to the study of international law*, p. 72), Hall (*International law*, p. 171, and also "International law and acts of Parliament," in *Law Quarterly Review*, 1893, p. 142, where he states numerous criticisms of this act). In France, it found a very unfavorable reception (Renault, *De l'exercice de la juridiction criminelle d'un Etat dans la mer territoriale*, in the *Journal du droit international privé*, vol. vi (1879), p. 238, and *Annuaire de lég. étrangère*, 1879, p. 69; Imbart-Latour, *La mer territoriale*, p. 313 et seq.; Pédellèvre, *Précis de droit international public*, vol. i, p. 575; Bonfils-Fauchille, *Manuel de droit international public*, No. 628; Pradier-Fodéré, *op. cit.*; Godey, *La mer côtière*, p. 67). But it is above all in Germany that it met the keenest opposition. Perels (*Das internationale öffentliche Recht*, p. 91), Heffter-Geffcken (*Völkerrecht*, 8th ed., p. 180), make, following the energetic expression of W. Schücking (*Das Küstenmeer*, p. 43), "a hard front against this English law" (beide scharf gegen jenes englische Gesetz Front machen). See also Stoerk, in the *Handbuch des Völkerrechts* of Holtzendorff, vol. ii, p. 451; von Bar, *Theorie und Praxis des internationalen Rechts*, vol. ii, p. 618. Stoerk admits that the state can push its jurisdiction to the limit of its sphere of interest. Von Bar thinks that such a system leaves still a large margin to the coastal jurisdiction and refuses to base upon interest the right of the coastal state (Diesem Satz, welcher aus dem Interesse ein Recht macht und zwar selbst aus dem einseitig behaupteten Interesse, kann ich nicht zustimmen). Cf. Wharton, *International law*, sec. 818; Morton, P. Henry in the *Journal du droit intern. privé*, vol. xiii (1886), p. 72. Finally in Belgium, see Rivier, *Principes du droit des gens*, vol. i, p. 149.

² Flore, *Traité de droit international pénal*, trans. Antoine, sec. 13; Jaray, *Crimes et délits commis dans les eaux étrangères*, p. 287.

³ Jaray, *op. cit.* and *loc. cit.*

⁴ Sic: Antoine sur Flore, *loc. cit.*

by strict repression. But, all nations having here the same interest, it is not from the interests of the coastal state that it can derive its right to dispense justice. The same reason requires that all routes be safe, not only near the coast, but beyond. The penal repression of wrecking can, therefore, as well be exercised by the nation whose ship is wrecked as by the local authority. The nation of the flag has even more interest in having its ships uninjured than the littoral nation finds in having its waters free from cases of collision. Who would dare to say that the consideration of a coastal prevention of collision would be, by preference to every other, the pledge of the greatest security for ships? There is not, consequently, any derogation here of the ordinary lack of jurisdiction, by reason of an interest which in this question is not peculiar to the bordering state. The Institute of International Law also, in its Paris rule, gives jurisdiction to the littoral State in the sole cases of offenses against the fiscal rights of the coastal state (customs, fisheries, etc.) or against those of its nationals not traveling on foreign ships (art. 6).¹ These two very legitimate exceptions do not affect the principle of jurisdictional incompetence over the territorial sea.² In short, in the first case, the State does not act through a duty of justice, but through a right of personal defense. In the second case, its nationals, let us note, have right to its protection only if they are off a foreign ship; then one of two things, either they are on the national ship or they are on the coast. In these conditions, the place of the offense is not the foreign ship, but either the coast or the national ship, deemed extraterritorial by the character of *res communis* which we attribute to the sea called territorial. It is not in short the place where the criminal is found at the moment of the crime, but that where the victim is found, which determines the place of the offense, since it is there that the crime produces its effects and requires its reparations. Finally, the Institute of International Law seems to restrict the want of jurisdiction to those ships alone which pass through the territorial sea. But this is only an apparent restriction; in short, when a ship stops it is in the harbors, the roadsteads, and the bays, that it casts anchor in the sheltered recess of national waters; in the sea, properly territorial, it is always moving. The Institute, by this provision, has simply brought the national sea (harbors, roadstead and bays (under the jurisdiction of the littoral State, without giving to it the sea properly

¹ *Annuaire de l'Institut de droit international*, vol. xiii, p. 316.

² Contra: Fedozzi, *Des délits à bord des navires marchands dans les eaux territoriales étrangères* in the *Revue gén. de dr. int. pub.*, vol. iv (1897), p. 209. For him the Institute of International Law, for ships passing, had "in a sort of way" sanctioned the French system of 1806; but neither the damaged right of the nationals of the crew and of the passengers, even foreigners, nor appeal to the local authority, nor the state of unrest, raised again by the opinion of 1806 as causes of jurisdiction, figure here. In the case where competence exists, see in the text in what measure and for what reasons.

territorial, where it is not practicable for ships to stand. In its Copenhagen session, it set forth precisely these ideas in imposing (Article 30) the coastal jurisdiction upon which ships in harbors, roadsteads, and bays, without saying anything, either at Paris or Copenhagen, of ships at anchor on the territorial sea; this is proof that in speaking of anchoring in the territorial sea, it meant, at Paris, the national sea, and following an error of which a trace is found at Copenhagen, it confused the two.¹

Thus following a doctrine almost unanimous,² sanctioned by the Institute of International Law,³ the coastal jurisdiction is not exercised over the territorial sea, except in case of legitimate defense of the coastal state. This is a consequence which can not be reconciled with the support of sovereignty. In vain would one plead as an exception the countries of the capitulations, which form sovereign States, although losing a part of their judicial powers, for a contractual renunciation makes of that loss a voluntary abdication and the circumstances of its origin make it a temporary anomaly. In vain would it be contended in support that in the national sea there is diminution of jurisdiction without, however, loss of sovereignty. For this diminution of jurisdiction, admitted by the Conseil d'État in 1806, swept away since by the effort of French jurisprudence,⁴ and condemned⁵ by the Institute of International Law,⁶ is rather a regulation of conflicts respecting jurisdiction than

¹ *Annuaire de l'Institut de droit international*, Vol. 16, p. 187.

² To the writers already cited add: Bluntschli, *Droit international codifié*, trans. Lardy, sec. 322: "The ships which pass along the coasts of a country and in a portion of the sea which makes up an integral part of the territory of that country are temporarily subject to the sovereignty of that state. In this sense (only) that they are governed by the military ordinances and the police regulations enacted for the security of the territory and of the population that lives on the shore."

³ *Annuaire de l'Institut de droit international*, Vol. 13, p. 316, and Vol. 16, p. 187.

⁴ One has often remarked the rules of a judgment (Cass., February 25, 1859, Dalloz, *Rec. pér.*, 1859, 1.88.), according to which there is jurisdiction "when the act constitutes a crime at common law, when its gravity does not permit any nation to leave it unpunished, without wronging its rights of jurisdictional and territorial sovereignty, because the crime is by itself the violation the most manifest, as well as the most flagrant, of the laws that every nation is in duty bound to cause to be respected in all the parts of its territory." Some, like Mittelstein, in the *Zeitschrift für internationales Privatrecht*, 1891, p. 665, attribute no importance to this rule. Others to the contrary (Renault, *Revue de la jurisprudence française*, in the *Revue de droit international et de lég. comp.*, vol. xiv (1882), p. 80, and especially Rostworowski, in the *Annales de l'École libre des sciences politiques*, 1895, p. 45), remark that this judgment breaks the narrow setting of the opinion of 1806 to enlarge the field of action for local justice.

⁵ It has also been severely criticised, as hybrid and limping, both in departing from the principle of territoriality (Rostworowski, *loc. cit.*) and in departing even from the contrary principle of extraterritoriality (Fedozzi, *Des délits à bord des navires marchands dans les eaux territoriales étrangères*, in the *Revue, gén. de dr. int. pub.*, vol. iv (1897), p. 214 et seq.).

⁶ M. Fedozzi (*loc. cit.*, p. 209, note 1) attributes to articles 30 and 31 of the Venice *lég. comp.*, vol. xiv (1882), p. 80, and especially Rostworowski, in the *Annales de l'École* project, voted without discussion at Copenhagen (*Annuaire de l'Institut de droit intern.*, vol. xvi, p. 222-220), the same importance as to the opinion of the Conseil d'État of 1806. This is to omit that Article 31 refers only to the case "of infraction of discipline and to the professional duties of the sailor" the following rule: "The local authority shall abstain from intervening, unless its cooperation be regularly sought, or unless the act disturbs the public peace." Article 28 (Copenhagen) lays down the

an absolute loss of the right of dispensing local justice.¹ In the rivalry of the laws of the harbor and of the ship, when the national interest is not involved, the French system leaves to the foreign authorities the matter of choosing for the victim between the law of the place and that of the flag, as in order to lessen the friction of opposing laws, individuals, claimed by two nationalities, are left to choose between them. It is then not to be pretended that the right of dispensing justice can be lost and sovereignty at the same time be preserved. On the territorial sea, where does not exist even the option as established by the opinion of 1806, there is not room for the maintenance of the right of justice; there is not, consequently, room for the maintenance of sovereignty. Since the opinion of the Conseil d'État of 1806, a twofold movement has appeared: on one hand jurisprudence and doctrine reproach the French system with diminishing too much the jurisdiction of the state on the sea properly national (harbors, roadsteads, and bays); on the other hand, more and more there is a tendency to reduce the jurisdiction of the state over the sea properly territorial. This double current is significant: on one side it is asserted that, if the coastal state is sovereign, it ought to have a complete power of dispensing justice; on the other, it is declared that it can not, in the territorial sea, have this complete power; how, then, would it be sovereign there? M. Clunet was right, when, at the Paris session, he stated that the Institute of International Law,² after having affirmed the principle of sovereignty, had just made a breach in it, by taking from the littoral state judicial jurisdiction over the territorial sea.³

entire competence of the port authority, except in the case of violation of the professional duties of the sailor, where it should not intervene unless it is requested to, and ought not to be able to find there any source of jurisdictional competence (Article 29). M. Dupuis (*L'Institut de droit international*. Sessions of Copenhagen, August, 1897, in the *Revue gen. de dr. int. pub.*, vol. iii (1896), p. 671) was not there in error.

¹ Cf. in this sense the judgment of dismissal in the Court of Assizes in the Jally case: "Whereas, if by a fiction of international law, a foreign ship, in French waters, can be considered as alien territory, the result of this fiction can not be to stop, in an absolute manner, the action of French law, but only to attach a preference or exclusiveness to the right of protection of the representative of the foreign nationality when he asks to exercise it." (Dalloz, *Rec. pér.*, 1859, 1, 88 and Sirey, *Rec. pér.*, 1859, 1, 183.)

² *Annuaire de l'Institut de droit international*, vol. 13, p. 314.

³ In the *Costa Rica Packet* affair, there is nothing on the question of jurisdiction, the offense charged against the captain of this ship having taken place on the free sea:

"Whereas, the prauw, floating derelict at sea and taken possession of in January, 1888, by Mr. Carpenter, the captain of the *Costa Rica Packet*, as seized by him incontrovertibly outside the territorial waters of the Dutch Indies." (Arbitral sentence between Great Britain and the Netherlands, rendered by Mr. Martens, February 13-25, 1897, cited and commented upon by Mr. Regelsperger, *L'affaire du Costa Rica Packet et la sentence arbitrale de M. Martens*, in this *Revue*, vol. iv (1897), p. 737.) The penal liabilities caused by the explosion of the American ship *Maine* likewise constitute a question foreign to our problem; this accident having happened in the port of Habana, does not belong to the territorial sea but to the national sea, and, on any side, does not enter into the precise interest of our subject.

Thus the idea creeps in steadily that, if the national sea is in the domain of the coastal State, the territorial sea is, like the high sea, the patrimony of mankind, *res communis*. Is this the character given to it? Then, not only the coastal State has not, in this belt, criminal jurisdiction, but it no more has the right of civil jurisdiction. It does not have it from the point of view of the jurisdiction of its own tribunals; it has it no more from the point of view of the application of its own law, for all these questions are bound together. The practical side of the problem presents itself in the delicate matter of collisions. Suppose that two ships come together in the foreign State's so-called territorial sea. What will be the tribunals competent to weigh the civil liabilities? What will be the law competent to rule them? Such are the two problems to be solved. They are already solved by this conclusion that the criminal offense, committed beyond harbors, bays, and roadsteads, lies outside the jurisdiction of the coastal State. When a collision causes human death, the coastal State has not jurisdiction to declare the penal responsibility. All writers have protested against the English act of 1878, passed to subject collision that results in death, to repressive actions on the part of the littoral State. The Institute of International Law has, without dispute, left this case outside the jurisdiction of the neighboring nation. (Paris rule, art. 6.) However, the same authors and the Institute, in its session at Lausanne in 1888, admit in respect to collisions, on the civil side, the coastal jurisdiction. These two solutions are hardly reconcilable. From the moment when criminal responsibility escapes the littoral jurisdiction, it is difficult for civil responsibility to belong to it: It would be too shocking to see go free on the civil side, one declared guilty on the criminal; the two actions, civil and public, should be connected and it is inadmissible that they can not coexist before the tribunals of the same State. To say that one is lacking is to recognize that neither is present. This solution presents itself from every point of view. As to what concerns jurisdiction, to accept that of the littoral State is not a good solution unless the colliding ship takes refuge in its ports, and it is better then to generalize by accepting jurisdiction of the first port entered since the collision;¹ moreover, in order to avoid in the execution of the judgment the embarrassment of an *exequatur*, that is to say, very often of a new trial, the best way is to give jurisdiction to the tribunals of the colliding ship itself; it is besides the solution gener-

¹ *Contra*: Aix, March 24, 1885, in the *Journ. du dr. intern. privé*, vol. xii (1885), p. 286. *Sic*: Lucques, December 24, 1869, in the *Giurisprudenza italiana*, III, 2. 320 and Cass. Florence, October 21, 1870, *eod. loc.*, IV, 1. 356; Anvers, October 18, 1884; in the *Journ. d'Anvers*, October 23, 1884; Police court of Falmouth, October 3, 1887, in the *Revue de droit maritime*, 1887-88, p. 608; Vittorio de Rossi, in the *Journal du dr. intern. privé*, vol. 12 (1885), p. 416.

ally selected.¹ As to what concerns the law applicable to the responsibility of the colliding ship, it is still the same solution that deserves preference. Why claim application of the coastal law if the coastal tribunals have not jurisdiction? How would a legislative competence exist where the possibility of a judicial competence is missing? Besides, to what inconveniences would not the application of the coastal law lead us? When the collision takes place on the national sea—that of harbors, roadsteads, and bays—data permit determining at what place within the limits of the roadstead or of the bay the collision could have taken place. When the accident happens on the territorial sea, it is much more difficult to determine exactly the point; therefore, in every case of collision, there is a dispute over the exact place of the meeting, and issue which night, fog, these great causes of collision, and the confusion which follows the encounter, will not often permit of solution. Such a system might be juridical when it would not be practical. It is better to leave the ship under the same *régime* as on the open sea—that is to say, under the law of the flag—this is the rule indicated where the two ships bear the same flag;² it is also the one which should be applied, when they are foreigners. International commerce, which requires uniform and simple rules, can only gain by this extension of the law of the flag;³ when the colliding ship obeys its national rules, whether at the moment of collision or, in the contrary case, in the reparation of its fault, it has satisfied the rule of justice, and if the latter is not yet obtained by the victim, it is not the fault of the colliding ship, it is that of the State to which it belongs and to which the others have a right to demand satisfaction for its insufficient legislation. The conclusion is, therefore, that the territorial sea can not confer on the coastal State any special jurisdiction in respect to collisions. Jurisprudence and compilers of decrees incline in a certain measure towards this principle. The movement is still very feeble. It is this, however, that the decrees outline. It commences when jurisprudence applies the severe forfeitures of articles 435 and 436⁴ of the French code of

¹ Alexandre, April 6, 1892, in the *Revue de droit maritime*, 1891-92, p. 599; Cass, August 3, 1892; *ibid.*, 1892-93, p. 16.

² Flore, who wishes to apply the territorial law at any price, nevertheless distinguishes determination of liability, for which it is necessary to follow the coastal law, and reparation of the damage, for which the national law should be followed. Flore, *De l'abordage des navires suivant le droit international*, in the *Revue du droit public et de la science politique en France et à l'étranger*, vol. III (1895), p. 297. But a new subject for complication in this distinction!

³ It is this law which in fact predominates in the doctrine accepted on the high sea. Lyon-Caen, *Etudes de droit international privé maritime*, No. 42; Rennes, Dec. 21, 1887, Sirey, *Rec. pér.*, 1888, 2, 25; Cass., Nov. 4, 1891, Sirey, *Rec. pér.*, 1892, I, 69; Trib. civ. Rouen, July 6, 1892, in the *Journ. du dr. intern. privé*, vol. XIX (1892), p. 1130.

⁴ These articles have been modified by the law of March 24, 1891.

commerce to collisions between French ships and foreign ones in the territorial waters of a foreign country.¹ It continues timidly when it separates, not without hesitation, the responsibility of the owner, a question they say of the contract, and that of the captain, a question of the quasi offense of collision, which alone is consequently subject to the coastal law.² What good is there in declaring the captain liable, according to the local law, when the owner, the only one really solvent, is held by the fault of the captain only according to another? Besides, what signifies the tendency of the state of French jurisprudence? What signify the tendencies which are complained of abroad in the sense of an extra-local jurisdiction? It is a matter of knowing, as a general thesis, whether practice is in opposition to interests with its refusal of jurisdiction which the theory of coastal servitudes imposes on the law of the littoral State. In this respect nothing more to the point than the expert assertion of the specialists. In September, 1888, at the session of Lausanne, M. Lyon-Caen proposed to put under the same *régime*, exception being made of interior waters, the territorial sea and the high sea, in respect to collisions.³ This proposal was rejected for reasons exclusively theoretical,⁴ to which we shall return soon. But, if the Institute of International Law gave it a poor welcome, the Congresses of maritime law, where the practical element predominates, show themselves favorable. In 1885, that of Antwerp passed this resolution:

“In the case of collision on interior waters the law of the territory is applicable. In the case of collision at sea (territorial waters or open sea) it is the law of the flag.”⁵

¹ Cass., August 4, 1875, Sirey, *Rec. pér.*, 1876, 1, 56, and the note Labbé; *Trib. corr. Seine*, September 3, 1883, in the *Journ. du dr. intern. privé*, vol. xi (1884), p. 208; Rouen, June 2, 1886, in the *Revue de droit maritime*, 1886-1887, p. 276; *Trib. corr. Nantes*, February 16, 1889, in the *Journ. de Nantes*, 1881, 1, 324; Deloynes, *Questions pratiques on matière d'abordage maritime*, p. 47; Sibille, *Jurisprudence en matière d'abordage*, No. 108, p. 87; de Valroger, *Droit maritime*, p. 342.

² The principle of this distinction is given authority by Cass., November 4, 1891, on the like conclusions of Advocate General Desjardins, Dalloz, *Rec. pér.*, 1892, 1, 401; Brest, January 22, 1887, and Rennes, December 21, 1887, Dalloz, *Rec. pér.*, 1889, 2, 145. The collision happened on the open sea. *Contra*: Cass., July 18, 1895, Sirey, *Rec. pér.*, 1895, 1, 305, with the note Lyon-Caen, and Dalloz, *Rec. pér.*, 1895, 1, 588, with the note Levillain. Cf. the criticisms of Lyon-Caen, *loc. cit.*; Levillain, *loc. cit.*; See also: Danjon, *Droit maritime*, p. 553, note 1; Desjardins, *Droit commercial maritime*, vol. II, No. 282; Asser. and Rivier, *Éléments de droit international privé*, p. 218; Despagnet, *Précis de droit international privé*, 1889, 2, 145; since the judgment of the Court of Cassation of July 18, 1895, the same system has been compelled at Bordeaux, June 24, 1896, and Cass. req., November 24, 1897, in the *Journal du droit intern. privé*, vol. xxi (1898), p. 28. The fault of the captain (there was no collision) in its indirect consequences (liability of the owner) is placed under the same law as its direct consequences (liability of the captain).

³ *Annuaire de l'Institut de droit international*, vol. x, p. 148.

⁴ Lyon-Caen, *Compte-rendu du Congrès d'Anvers*, in the *Revue de droit intern. et de lég. comparée*, vol. xix (1887), p. 395. Cf. the proposal of Travers Twiss, *Actes du Congrès international de droit commercial d'Anvers*, Brussels, 1886, I, pp. 130-145. Cf. Schücking, *Das Küstenmeer*, p. 47.

⁵ *Annales de droit commercial française étranger et international*, vol. III (1889), p. 184.

Three years later at Brussels, "It is understood that territorial waters, in respect to collision, would be considered like the whole sea."¹ Practice is so favorable to this system that, in spite of its rejection by the Institute at Lausanne, it came finally before the governments. In 1891, at Hamburg session,² M. Lyon-Caen communicated to the Institute, which had rejected it, the adherence that this system had been given by the Belgian Government, which declared itself ready to conclude treaties on this basis, and by that of Portugal, which had accepted it. He added that in France and the Netherlands the question was under consideration, and in a resolution which diminished somewhat the authority of its first vote, the Institute, far from persisting in it, declared, as much by conviction as by courtesy, that an investigation on this head is desirable.

What is it then that still holds back the advocates of the opposing system? Is it a practical reason? Nobody ever gave one. Writers, judgments, all base their solution on this single reason that the territorial sea is under the sovereignty of the littoral State. When at Lausanne, in 1888, M. Renault undertook the criticism of M. Lyon-Caen's proposal, this was the only reason he set forth.³ Since then, in their *Traité de droit commercial*, the two eminent writers have had to reconcile their divergent views. They recognize it "preferable to treat collisions on the territorial sea like those on interior waters."⁴ But do they give a practical reason, drawn from principles and commercial necessities? By no means. They invoke sovereignty, but in terms so attenuated that one asks what is left when they have said:

The littoral State is no longer the sovereign of the territorial sea; but it has the power to make police laws for that portion of the sea and its tribunals are competent to apply them.

What does this say if not that it is sovereign in effect, but not in principle? Therefore, if practice has not here the satisfaction it requires, it is because of a thin, colorless sovereignty which can not assert itself, for eminent writers well feel that the territorial sea is not under the sovereignty of the littoral state. But, then, why is coastal collision under this law? This is the answer:

A State has an evident interest in there being no collision within its territorial waters.

¹ In 1893, at Genoa, the matter of collision in territorial waters was not touched. In taking a "resolution concerning the fixing of international jurisdiction so as to take cognizance of collisions (Articles 1-6) the Congress, 'more Italian than international,' showed a practical opinion in respect to the jurisdiction of the coastal state." For the text and the circumstances, see Fromageot, in the *Bulletin de la Société de législation comparée*, 1893, p. 81-113.

² *Annuaire de l'Institut de droit international*, vol. xi, p. 441.

³ *Ibid.*, vol. x, p. 148.

⁴ *Traité de droit commercial*, vol. vi, p. 167.

This short sentence is of extreme importance; it is the pivot of the system. But there is an interest still more evident for the state whose ship has suffered collision, in that it should be whole and safe. Does this say that it is going to assume jurisdiction in collision in preference to all others? To plead such a reason is to put the coastal law out of court. In refusing to admit the sovereignty of the littoral State, how can the two eminent writers recognize in it the right of legislation which springs precisely from sovereignty? To affirm that the territorial sea does not exist in a distinct way, that it is *res communis* and consists only of a very slender parcel of servitudes over the sea, is therefore to express an idea which is not new, but in essence already in the best doctrine.

Finally, in respect to fishing, the littoral State can not claim a privileged right. It is the consequence of this principle that it can not without necessity restrict the right of all to the free sea. In the name of what necessity would it claim for itself the monopoly of fishing? Does one plead the requirements of defense of the coasts, which, after having imposed special duties on the coastal populations, call sharply for a compensation? But is not this compensation to be found elsewhere than in a monopoly which benefits, not all on the maritime registers but the fishermen alone, and not including those embarked on long cruises?¹ Many other advantages (retiring pensions, etc.),² not to mention the possibility for the sailor to remain in his profession during his period of military service, make up for the comparative prejudice that comes to him from the prolongation of active service and the great chance of a call to action. Briefly, the reason drawn from the maritime inscription is quite disputable. Bound to the internal organization of national defense, this reason has value only in internal law to explain the reservation of the fisheries to a class of nationals, but not to justify, in international law, attributing a monopoly to a coastal State. The right of fishing is so little necessary to the littoral State that it can unquestionably cede it. The treaty of Utrecht of March 13, 1713,³ offers a celebrated example of this (art. 13) in giving to the French the right of exclusive fishing on the coast of Newfoundland.⁴ Subsequent treaties have broadened and defined this right,

¹ Cf. the law of maritime inscription of December 20, 1896.

² See the preparatory proceedings in Sirey, *Lois annotées*, 1897.

³ See the text in the Yellow Book, *Affaires de Terre-Neuve*, 1891, No. 1, p. 1.

⁴ The treaty grants, in effect, not permission to fish to the French, but surrender in their favor by the English of their right. "The English have no right to fish similar to ours, because such a right does not exist of itself, because it ought to be stipulated by writing and because in this particular case this is not done." (Admiral Krantz, Minister of the Marine, to Mr. Gobelet, Minister for Foreign Affairs, January 30, 1889, in the Yellow Book, *supra* cit., No. 124, p. 206. See, however, in the contrary sense the English pretensions, p. 257 *et seq.*, Memorandum of the Foreign Office, July 9, 1889.)

which exists always.¹ It is manifest proof that a state can renounce without peril a monopoly of fishing. Other states, by their internal laws, assert the liberty of fishing in their coastal waters.² How, then, would reserving it to the nationals be internationally indispensable to the coastal State? Very long ago, France, even she, was under this *régime*; a few rare treaties reserve to our nationals the coastal fisheries, in exchange for reciprocity on foreign coasts; it is only March 1, 1888,³ that the internal law demand itself able to assert, in a general way, this practice, limited until then to partial applications; but, in doing so, much more was yielded to domestic and contingent reasons than to international and permanent considerations. Let us recall the date of this law. At that epoch, a movement of hostility against foreigners was manifested in public opinion; Parliament was occupied with bills to tax foreign laborers;⁴ statistics showed the threatening presence, along the frontier, of bodies of foreigners proof against fusion;⁵ to force them to assimilate, that is to say to become naturalized, the legislature was ready to make use of every means. It was with this intention that it voted, without hesitation, the law of 1888, although less against foreign fishermen living outside of France than against foreign fishermen settled for several generations on the coast of France. The law respecting the fisheries was a means of forcing them to become naturalized; moreover, on this point, the new law had the expected consequence and produced, especially on the Algerian coast, quite a marked upward movement in the curve, until then declining, of naturalizations.⁶ But this reason, drawn from the subject of *heimatlosat*, is not sufficient, for there are other means of combating that without this special measure, limited to a small group of expatriates.⁷ One does not find an apparent monopoly on a need of expediency. Then, what reason is there to give? Will it be said that quarrels will

¹ The treaty of peace signed at Paris, February 10, 1763, between France, Spain, and Great Britain; the treaty of peace signed at Versailles September 3, 1783, between France and Great Britain; declaration of September 3, 1783; counter declaration of September 3, 1783. See these texts in the Yellow Book relating to the *Affaires de Terre-Neuve*, *supra* cit., p. 1-4. See also: Cruchon, *Les pêcheries de Terre-Neuve*, in the *Annales de l'Ecole libre des sciences politiques*, 1891, p. 497.

² In this sense are cited the United States, Greece, Portugal. Cf. Godey, *La mer côtière*, p. 56, and Schücking, *Das Küstenmeer im internationalen Rechte*, p. 36. These writers both add, in the sense of liberty, the Netherlands, which has a different *régime* since the law of October 26, 1889. (See Mulder, *Notice générale sur les travaux des États généraux des Pays-Bas*, in the *Annuaire de législation étrangère*, 1891, p. 519. Cf. *infra*, text and notes.

³ *Journal officiel* of March 2 and Dalloz, *Rec. pér.*, 1888, 4. 30.

⁴ Pradon projet.

⁵ Bertheau, *De la police des étrangers en France*, in the *Journal du droit international privé*, vol. xiv (1887), p. 583; *Journal des économistes*, 4th series, vol. xxxvii, February, 1887, p. 245; Ducrocq, in the *Journal de la Société de statistique de Paris*, 1890, p. 69.

⁶ See the figures in Olier, *Les résultats de la législation sur la nationalité en Algérie*, in the *Revue politique et parlementaire*, vol. xlii (1897), p. 556, note 3.

⁷ For example, the reform of the laws on nationality by birth, or, better yet, on naturalization.

break out between nationals and foreign fishermen in the territorial sea because of a difference of nationality unless one takes care to separate them?¹ But if this reason is good for their separation in the territorial sea, it is still necessary to isolate them by nationalities on the high sea. Will it be pretended that the coastal state, paying the expenses of lighting, buoyage, etc., in the bordering sea, ought to withdraw some advantage from it? But why should it get back a compensation, by reason of expenses which in every case it ought to make and whose price it collects abroad, through reciprocity, when its ships benefit from the lighthouses and beacons located in foreign waters. It is in vain that we seek a reasonable basis for the monopoly of fishing. Unless we admit not only sovereignty, which allows only of regulating fishing, but also ownership, which permits exercising it alone,² it is impossible to consider coastal fishing as a natural monopoly of the littoral State.

Such is the stern consequence system which considers the coastal sea as *res communis*, subject to servitudes which the inherent necessities for the protection of the neighboring State explain. Is this consequence in harmony with the present evolution of law and the tendencies of modern practice? Doubtless, it harmonizes with the internal legislation of a certain number of countries (the United States, Greece, Portugal).³ On the other hand, it appears to be in disagreement⁴ with the legislative movement which has just taken place in France,⁵ in Belgium,⁶ and in the Netherlands,⁷ where recent laws have just asserted the monopoly of fishing in the coastal waters (laws of March 1, 1888, August 19, 1891, and October 26, 1889). But the significance of this disagreement is weakened in sensible degree before the following statements: 1°. It is not spontaneously, but in order to reply to English pretensions, always vitiated by the

¹ Speaking of the text relative to the fisheries of Newfoundland, "the spirit and the aim of the provisions cited were to isolate the fisheries of the two nations in two separate regions to prevent the quarrels and strife of earlier years." (Admiral Krantz, Minister of the Marine, to Mr. Spuller, Minister for Foreign Affairs, July 12, 1889, in the Yellow Book, *Affaires de Terre-Neuve*, No. 139, p. 271.) On the other hand, the English declare that where France and England fish side by side there is no difficulty. "There have recently arisen only a few, if any, difficulties between French and British fishermen on the coasts and in the waters of Newfoundland." (See a dispatch of Lord Salisbury, March 28, 1889, *cod. loc.*, p. 213.)

² We have already made this observation, speaking of the system of ownership. See *supra*.

³ Schücking, *Das Küstenmeer*, p. 34.

⁴ Germany (art. 296, Penal Code), reported by Perels, *Droit maritime*, p. 50; England (Hall, *International law*, p. 126); Norway (Aubert, *La mer territoriale de la Norvège*) follow the monopoly system. Italy requires of foreign ships purchase of a license.

⁵ Dalloz, *Rec. pér.*, 1888, 4, 30. See also the decree of May 1, 1897, regulating the coral fishery in Algiers, art. 2; it can not be carried on except by French boats. (Sirey, *Lois annotées*, 1897, p. 376.)

⁶ Text, with notes, by Paul Fauchille, in the *Annuaire de législation étrangère*, 1892, p. 567.

⁷ Mulder, *Notice générale sur les travaux des États généraux des Pays-Bas*, in the *Annuaire de législation étrangère*, 1891, p. 519.

memory of Selden, and to the German pretensions, that this legislation has been formed; it is a means of reprisals. The studies preparatory to these laws attest it, especially in what concerns France.¹ 2°. Before proceeding by way of internal legislation, it was thought proper to make treaties: the French treaties of August 2, 1839, with England,² of February 6, 1882,³ with Spain;⁴ the treaty of The Hague of May 6, 1882,⁵ between the powers bordering on the North Sea, except Norway.⁶ It is only after this last convention that the recent legislative movement, of which we spoke, took place. 3°. Finally, both in the preparatory papers and in the very text of the laws above mentioned, there is express mention made of the international agreements in consequence of which they dealt with the question. "Various considerations modified little by little the ideas of the French Government, without bringing it at any time to believe that it could, without special convention, reserve exclusively for our nationals the use of the fisheries in our territorial waters," declares Mr. Letellier, an advocate of the French law.⁷ But when the treaties have generalized this system, the Government hesitates no longer; hence, the law of 1888. In Belgium, the law of August 19, 1891, is couched in a very characteristic fashion; not only has the Belgian legislator not entered upon the subject, except after having taken care to vote treaties concerning fisheries with the other States bordering on the North Sea, but article 1 refers to it:

Conformably to the stipulations of articles 2 and 3 of the international convention concluded at The Hague, May 6, 1882, fishing, whether done on board or by small detached craft, is hereafter prohibited to every foreign boat, within the radius of three geographical miles of 60 to a degree of latitude.⁸

Better, it is because this right only exists within the limits where treaties have established it, that the law counts in miles instead of counting in meters, for, in stating the meter as the unit of measure, the Belgian law of March 1, 1855,⁹ made exception (art. 3) for acts in which mention must be made of foreign negotiations. Finally the Netherlands, which Mr. Letellier cited in his report to the chamber as practicing liberty of fishing, have, following the treaty of The Hague, enacted October 26, 1889, the prohibition of fishing by for-

¹ Letellier report. *Journal officiel*, Chamber of Deputies, Parliamentary debates, February 24, 1888. There was no discussion in the Chambers.

² De Clerk, *Recueil des traités de la France*, vol. iv, p. 497.

³ Dalloz, *Rec. pér.*, 1883, 4, 34.

⁴ The Franco-Italian treaty of November 3, 1881, must have contained provisions concerning fishery which were not finally adopted. Cf. Dalloz, *Rec. pér.*, 1883, 4, 30.

⁵ De Martens, *Nouveau recueil général de traités*, 2d series, vol. 9, p. 556.

⁶ Norway withdrew before signature. For the reason of this withdrawal it touches the limit adopted for the territorial sea. See *infra*.

⁷ *Journal officiel* of February 24, 1888, and Dalloz, *Rec. pér.*, 1888, 4, 30.

⁸ *Annuaire de législation étrangère*, 1892, p. 567.

⁹ Observation of Paul Fauchille, *loc. cit.*, p. 569.

eigners in the territorial waters of the Kingdom.¹ This is proof that the three recent laws of 1888, 1889, and 1891 do not consider the monopoly of fishing as admissible without an agreement with foreign states, but regard it as an accidental right, born of convention, not as a permanent natural right.

According to this understanding, the right of fishing in coastal waters, based on the contractual reciprocity which comes from conventions, or on tacit reciprocity, which comes from two similar laws, can be perfectly reconciled with the negation of the territorial sea. On the sea, *res communis*, States are permitted to stipulate with one another for their abstention from certain acts and notably from fishing within a determined radius, during a given time, this abstention being moreover with a limit, for if one can renounce, for a time, the use of a faculty, he can not, in any case, renounce the faculty itself.²

The harmony of the new system of coastal servitudes with the state of present day law, its practical adaptability and convenience are thus seen to be demonstrated.

III.

It remains to determine the breadth of the coastal belt according to the different ideas that we have brought together.

In the system of ownership of coastal waters, the State, master of the sea because it is so of the shore, has right only to the waters within the limit where the sea bottom, by its geological characteristics, is a continuation of the shore. It is to soundings, alone capable of showing this, that belongs the fixing of the limits of the territorial sea. Such is in short the method presented by Valin who, logically, after having asserted ownership in the littoral State, measures its right by sounding;³ in so far as it brings material similar to that on the coast, the right of the littoral State endures; when it brings up others or when it brings up nothing, the right of that state vanishes. An inadmissible system⁴ because there are coasts so precipitous that sounding brings nothing up, so that the territorial sea, following limits as capricious as unfair, would be in one place very broad, in another very narrow, and, by the variety of its radius, would baffle practical use, which would be obliged to follow, upon a map difficult to prepare, the excessively irregular and complicated sinuosities. Again, in the system of ownership of coastal waters, some prefer to employ the rule of eye. The territorial sea would

¹ *Annuaire de législation étrangère*, 1891, p. 519.

² It is thus that one may be obliged not to marry or not to remarry for a given time, whilst it is impossible legally to contract never to marry. Jurisprudence has applied this principle to the state of widowhood.

³ Valin, *Nouveau commentaire sur l'Ordonnance de la marine*, liv. v, tit. I.

⁴ Ortolan, *Règles internationales et diplomatie de la mer*, vol. I, p. 166.

extend from the coasts to the limit of vision. There is here without doubt a trace of the old Roman way¹ of climbing a tower, and taking possession of all the territory which, from that viewpoint, unrolls itself to the eyes. Even so, from lighthouses and semaphores, or simply from a cliff, the littoral state, with the eye of its subjects, would have tacitly taken possession of all the waters that they saw. But this criterion, rightly rejected by Bynkershoek,² could not be preserved. The prospect does not increase doubtless with the instruments employed, which only develop sharpness without enlarging the field, but it increases with the height of the point of observation, and we therefore again fall into arbitrariness, which compelled us to reject the rule of sounding. So the measure by the visual angle, after having been stated as a formula by Philip II of Spain³ and preserved by de Rayneval⁴ has at present no possible value. If it has been taken up lately⁵ with more cleverness than success,⁶ it is for two special reasons, which ought not to make one believe that it has intrinsic merit. Maintained by Godey, this system, which brings it all back to the eye, of course pleases him as a mariner, because a man who follows the sea, accustomed to scan the distant horizon, is naturally inclined to exaggerate the importance of the reach of vision. Whilst by professional bent Godey was already inclined toward this system, a second reason fixed him there; it is that he is not able to leave to the artillery, by its cannon, the measure of the territorial sea.

This method proceeds directly from the sovereignty of the littoral state. If this sovereignty extends over the adjacent sea, it is because the cannon of the coasts carry it there; it is consequently within the limit where this extension takes places. *Terrae potestas finitur ubi finitur armorum vis.*⁷ Even if the littoral state had of sovereignty only some fragments delegated in a common interest of police and jurisdiction, it is still at the limit of cannon shot that the territorial sea would stop; for, where the cannon stops, the special means of coercion which the coastal state can draw from the bank likewise depart. Whether sovereignty be complete or partial, peculiar to the coastal state or delegated in the interests of all, the result is always the same; it is the cannon which must fix the limit.⁸

¹ F. 1, sec. 21, Digest, liv. xlv, tit. 2.

² *De dominio maris*, cap. ii.

³ Bynkershoek, *loc. cit.*

⁴ *Institutes du droit de la nature et des gens*, 1851, vol. 1, p. 300.

⁵ Godey, *Les limites de la mer territoriale*, in *Revue Générale*, vol. III (1896), p. 229.

⁶ Cf. the rejection of this system by Giulio Dlena, *I tribunali delle prede belliche*, p. 146, note 4, and by Schücking, who knows the work of Godey and nevertheless rejects the rule of eye, *Das Küstenmeer*, p. 9.

⁷ Bynkershoek, *loc. supra cit.*

⁸ Surland, *Grundsätze des Europäischen Seerechts*, 1750, p. 88; Moser, *Grundsätze des europ. Völkerrechts*, vol. iv, cap. 1, sec. 3; Fischer, *Lehrbegriff sammtl. Kameral- u. Polizei. Rechte*, 1785, vol. III, p. 6; Günther, *Europäisches Völkerrecht*, 1792, vol. II, p. 52; Vattel, *Droit des gens*, liv. I, ch. xxiii, sec. 289; Klüber, *Droit des gens moderne*

But just so the system of sovereignty, full of partial, meets its condemnation by this consequence which raises numerous objections.

1.^o If the range of the territorial sea follows that of arms, it is perpetually unstable. Whilst the national sea is always the same, the territorial sea is perpetually changing with the progress of artillery. How admit it to be thus unceasingly moving and never fixed? Does not practicality require, on the contrary, a firm, unchanging definition? As soon as one invention appears, which increases the range, at the same moment the territorial sea is immediately widened. But how will other nations be invention? In order to give them a chance to oppose it, would it not be necessary for the littoral State to notify them? Already there have been notifications in respect to blockades and contraband of war. To this list should we have to add notices concerning the territorial sea? But from what moment will they be obligatory; can they come to the knowledge of ships on a voyage; in what case will exceptions of ignorance and good faith have value against contrary presumptions? All the difficulties that notifications raise reappear then.¹ But there is one more, which it not yet felt in the matter of blockades nor contraband of war. The notification can never be made, without immediately publishing the grounds thereof. But here, how verify the advance of artillery? How would the states to whom the new discovery gives a new coastal limit be allowed to control the reality of a discovery which interests the State in the secrets of national defense? And, as they could not be forced: 1, either the State would publish the result without the method, and then there would be no guaranty for others; 2, or the State would keep for itself not only the result but the method, so that the limit of the territorial sea would no longer follow the real range of cannon: such is the dilemma where this method leads us, unacceptable equally in either branch.

2.^o The advance of science increases daily, the territorial sea is called upon in this system always to be increased. At the end of the

de l'Europe, ed. Ott. 1861, sec. 130; Ortolan, *Règles internationales et diplomatie de la mer*, vol. i. p. 153 et seq.; Pistoys and Duverdy, *Traité des prises maritimes*, 1855, vol. i, p. 93; Cauchy, *Le droit maritime international*, 1862, vol. ii, p. 151; Bluntschli, *Droit international codifié*, art. 302; Heffter, *Le droit international public de l'Europe*, trans. Bergson, sec. 75; Perels, *Manuel de droit maritime international*, trans. Arendt, p. 28 et seq.; Flore, *Trattato di diritto internazionale pubblico*, 3d ed., 1887-1891, vol. ii, no. 822, p. 72; Travers Twiss, *The law of nations*, vol. i, sec. 172, p. 249; Phillimore, *Commentaries upon international law*, vol. ii, p. 235; Kent, *Commentary on American law*, vol. i, p. 31; Wheaton *Eléments du droit international*, 5th ed., pp. 168 and 169; Woolsey, *Introduction in the study of int. law*, p. 69; Pappafava, *De la mer territoriale et de la soumission des navires étrangers à la juridiction locale*, in the *Journal du droit international privé*, vol. xiv (1887), p. 446; F. Martens, *L'arbitrage de Paris et la mer territoriale*, in *Revue Générale*, vol. i (1894), p. 48, and the arbitral sentence in the *Costa Rica Packet* case (Feb. 13, 1897), in the same *Revue*, vol. iv (1897), p. 737, note. W. Schücking (*Das Küstenmeer*, p. 13) pretends only thus to determine the limit that it may not be passed under any pretext without daring to impose upon the state the policing of the coasts as far as it has cannon range.

¹ It was for this very reason that G. Diena (*I tribunali delle prede*, p. 337) here demands international tribunals.

eighteenth century, gun range did not extend 3 miles. By the invention of the rifled cannon of Armstrong it goes up to 6 miles. Finally, the Krupp works to-day build cannons which reach nearly 11 miles. At the Chicago Exposition of 1893 this great firm sent a coast gun (Küstenkanone) which, in April, 1892, on the testing field of Meppen, with an inclination of 44 degrees, had reached a range of 20,226 meters.¹ Is this nevertheless the last word on projectiles? Will not science, marching by rapid strides, further increase the power of arms? Whatever shall be the new inventions, it is allowable to say that the range of means of destruction must increase with time. If the territorial sea is the expression of the power that artillery gives to the coastal State, this sea is called upon without end to grow with the progress of cannon. Day before yesterday at 3 miles, yesterday at 6, to-day at 11, tomorrow at 15, the next perhaps at 20, and always more and more, the free domain of the high sea, invaded little by little by the increasing sovereignty of the littoral state, will pass each day within more restricted bounds. To what purpose then to have advanced, with Grotius, as a triumph of the new idea, the principle of the liberty of the ocean, if every discovery in the science of hurling projectiles must now produce in international law a curtailment of this liberty? Is it admissible that with the development of science the world is to retrograde? Is it not absurd that from the conquest of modern inventive power should come defeat of law?

3°. If the territorial sea extends to the extreme limit of gunshot, seas somewhat contracted fall entirely under the sovereignty of the littoral States; and straits, often less in width than the total gun range from the two banks, immediately raise a particular difficulty. The Channel, which measures up to 60 and 90 miles in width, decreases at Calais to 18 miles.² Now the English cannon sweep 11 miles from the English bank, and the French cannon sweeping as much from the French bank, there is a total of 22 miles that the two groups of cannon command, whilst the strait is only 18 broad. In the middle here, a zone of 4 miles, equally dominated by the cannon of the two banks, should be, by this way of measuring, the territorial sea, English and French at the same time. Will it be said that it is neutral? But then the territorial sea is no longer measured by cannon, since it stops at 9 miles, whilst that keeps on to 11. Will it be said that it is common? But one piece of territory can only belong to a single sovereignty. From the forts located on the frontier, the State holds under its guns an entire portion of enemy's territory. From its own forts, the other State can similiary command, up to a certain distance, the territory of its neighbor. Is it to be said that on the frontier zone, the strip which can be swept

¹ Schücking, *Das Küstenmeer im internationalen Rechte*, p. 11.

² These distances are given by Godey, *La mer côtière*, p. 25, note 1.

from the two sides is subject to a common sovereignty of adjacent states? But if this is inadmissible on the land frontier, for what reason should it be admitted on the sea frontier?

4°. Will it be said, in restricting the territorial sea, in order to avoid these objections, that it does not exceed 6 miles, because measuring from that distance, if it is possible to reach the end, it is no longer possible to aim? "Can it not be said that the extreme range of vision of the human eye limits almost exactly the effective power of coast artillery?" asks Godey. Led away by the desire of reconciling his rule by eye with that of cannon, his reasoning is inadmissible.¹ It is not a matter of knowing whether, from the coast, any particular object in the territorial sea can be surely struck; for, as the possibility of hitting a target varies with its size, there would then be one territorial sea for small boats, then a second with a different limit for small ships, a third still farther out for ships of average size, and a fourth for large vessels.

5°. Finally, in this system where the territorial sea changes with each advance in the science of arms, what becomes of the rights of other countries? For, in the conception of the coastal state sovereign, from which the rule by cannon proceeds as a consequence proceeds from a principle, the sovereign has manifold rights: of police, justice, and fishery. Is he to be permitted to exercise these rights to such a distance? The other countries, who are not there amenable to justice or to the fishing regulations, have acquired some rights to live under the old law, have they not? Is it not a principle that the deed of man can not restrict vested rights, and is the progress of artillery anything else than such an act? But then the territorial sea, if stopping at the first limit of arms, is going to become less than 3 miles; for it was only to some meters in the time of the bow, before reaching 3 miles in the time of cannon, and if it is necessary to respect vested rights, why stop at miles rather than at meters?

6°. So practice, whose infallible instinct never strays, rejects here the measure by arms. To be sure, a certain number of texts adopt expressly cannon range as a limit of the rights of the littoral State over the territorial sea; but in doing so, they add, in a precise way, that this modern cannon range reaches only 3 miles, by a fiction which would be strange if it were not still more audacious. Thus, in the Russian law of 1869² on captures and recaptures, which that more recent one of 1895³ has not modified on this point, it is expressly said that the territorial waters are "at cannon range from the coast batteries;" but immediately the text takes care to add "*or*

¹ Godey, *op. cit.*, p. 21 and *Revue Générale*, vol. III (1896), p. 231.

² F. Martens, *Le tribunal d'arbitrage de Paris et la mer territoriale*, in *Revue Générale*, vol. I (1894), p. 38.

³ See *Revue Générale*, vol. IV (1897), Documents, p. 6.

at a distance of 3 marine miles from the shore." Likewise, in its declaration of neutrality, in 1870, at the time of the Franco-German war, Japan forbade to the belligerents every hostile act "within cannon range, that being 3 miles."¹ In the rare case when, within 50 years,² a text refers formally to cannon range, there is at the same time care taken to reduce it, by a presumption, to 3 marine miles.³ What more significant? How much better to say that the territorial sea is not bound up with the State of the science of artillery. It is to-day notorious that the distance of 3 miles does not correspond to the progress of that science. It is, however, to this distance that, with an unconquerable obstinacy, all diplomatic conventions hold. At the Hague Conference on the North Sea fisheries, October 10, 1881, it was at the old limit of 3 miles that the delegates fixed the confines of the territorial sea, in spite of the efforts of the Norwegian delegate, M. E. Bretteville,⁴ to have them increase it; and, although this difference, in the end, prevented Norway from adhering to the treaty (Protocol No. 2, May 6, 1882).⁵ At the Paris conference, on the neutralization of the Suez Canal and of the territorial sea thereto approaching, it was in vain that the Russian Government tried to have this limit extended beyond 3 miles.⁶ "Here it is found," wrote our ambassador, Gen. Appert, from St. Petersburg, to the minister for foreign affairs, "that the distance of 3 miles is not sufficient." (June 9, 1885.)⁷ Was this not an opportunity to reestablish between the sea and the cannon the old harmony thenceforth destroyed? When the cannon carries beyond 3 miles up to nearly treble that distance, how hold to 3 miles without contradiction? And yet it is at 3 miles, in complete disagreement with cannon range, that the Paris Conference and the Constantinople treaty (Article 4) on the Suez Canal (Oct. 29, 1888)⁸ stood firm with the same obstinacy as the Hague Conference on the fisheries. It is so utterly inadmissible, in practice, to make the territorial sea coincide with the field of coast batteries, that writers and diplomats, even when they wish to restore here the harmony broken by progress in the science, do not venture to go clear to the end of their opinion. Secretary of State Seward, in the note of October 16, 1864, proposed to Great Britain, in the name of the Washington Government, to extend the distance

¹ Calvo, *Le droit international théorique et pratique*, 4th edit., vol. iv, p. 481.

² Cf. the old illustrations given from 1795 to 1825 by G. Dena, *I tribunali delle prede belliche*, 1896, p. 153.

³ Except in the Italian in instructions of June 20, 1866.

⁴ Hopf, Continuation of *Recueil général des traités* (G. F. Martens), 2d series, vol. ix p. 510.

⁵ *Ibid.*, p. 554.

⁶ Cf. the remarks of the Russian delegate, Mr. Il'trovo, cited by d'Avril, *Négociations relatives au canal de Suez*, in the *Revue d'histoire diplomatique*, vol. ii (1888), p. 168.

⁷ D'Avril, *supra cit.*, p. 169.

⁸ Calvo, *op cit.*, General supplement, p. 59: Asser, in the *Revue de dr. intern. et de lég. comp.*, vol. xx (1888), p. 529.

to 5 miles only.¹ Holland, in December, 1895, proposes to the other governments 6 miles.² Thus, even when they pretend to make the territorial sea follow the progress of the cannon, it still remains behind. The Institute of International Law, instead of fixing it at 10 miles, as several of its members wished, likewise, at Paris (1894), stopped at 6 miles, though recognizing in Article 4 of its project, that this distance is indisputably short of cannon range from the coasts. Thus the projects formed to harmonize the territorial sea with the progress of artillery, all halt half way. Is this not proof that the territorial sea and the coastal artillery have no intimate bond. and that the science of projectiles here is not the source of the law? Thus customs does not care to be troubled in its understanding of the fisheries, the customs, or the police by the progress of the Armstrong, Schneider, or Krupp works. With a stubbornness which, in the system of sovereignty, must appear like a desperate contradiction, it holds always to 3 miles. On the eve of the Paris session, the Behring Sea arbitral tribunal admitted "3 miles as the ordinary limit of the territorial sea."³ Even after the session of the Institute, the French decree, of June 12, 1896, on the conditions of admission and sojourn of ships in time of war, still preserves the distance of 3 miles for the territorial sea.⁴ The English, who are essentially positive, are not deceived there; and it is an English jurist, Hall, who has expressed the true view of practice by declaring "there was no relation between cannon range and the means of causing neutrality to be respected,"⁵ that is to say, the territorial sea. The partisans of the idea of sovereignty feel, indeed, that it is for the cannon to fix here the limit, and Mr. Martens, consistently with this system, has recently made an application of it in the reasons, if not in the opinion, of his arbitral judgment in the *Costa Rica Packet* case.⁶ But to this assertion, quite theoretical, the custom of all states gives a constant negative. the Hague Conference (1881-2) was unwilling to accept 4 miles for the fisheries;⁷ how accept 10 or 12 miles, that is to say, more than 20 kilometers? The *Territorial Waters Act* is regarded as an anomaly, because it extends the justice of the shore to 3 miles out.⁸ What would it be if it carried it to three times that? It is even start-

¹ Bluntschli, *Droit international codifié*, trans. Lardy, p. 184.

² Godey, *op. cit.*, p. 13.

³ *Tribunal arbitral (sentence, déclarations et protocoles) des pêcheries de Behring*. Paris, 1894, pp. 119 and 182. See also *Contre-Mémoire des Etats-Unis devant le tribunal d'arbitrage*, Paris, 1893, p. 11.

⁴ See *Revue Générale*, vol. iv (1897), Documents, p. 5.

⁵ *Annuaire de l'Institut de droit international*, vol. 13, p. 300.

⁶ "Considering that the right of sovereignty of the State over territorial waters is determined by the range of cannon measured from the low water mark." Cf. Regelsperger, *L'affaire du Costa Rica Packet et la sentence arbitral de M. Martens*, in *Revue Générale*, vol. iv (1897), p. 737.

⁷ G. F. Martens, *Recueil général de traités*, 2d series, vol. ix, p. 510.

⁸ *The Law Quarterly Review*, 1893, p. 142.

ling that at 3 miles French nationality seized a child born on French territory. What would it be, then, at 10 miles? Doubtless, these results are not forced,¹ and we have disposed of them. But, if we abandon them, it is necessary to reject the system of sovereignty, and, if we put aside the principle of sovereignty, rule by cannon is immediately done away with.

It is necessary to render to the measure by artillery this justice that it has set a legitimate check to the ambition of the littoral State over the neighboring sea. While Bodin fixed it at 30 leagues² and Casaregis³ at 100 miles, it is the merit of Grotius and of Bynkershoek that they restrict this limit to reasonable proportions by interposing the famous principle "*quatenus ex terra cogi possunt.*" But this rule in international law has only a value of expediency: If it has been favorable to the cause of liberty of the seas, threatened by invasions by the littoral State, upon which it has placed a check, it is not in itself true, and, today when the advances of artillery augment the power of cannon, it could become as dangerous to the liberty of the seas as it formerly was useful to it.

Thus we arrive at the conclusion that with the two theories, whether of ownership or of sovereignty of the littoral State, the reaches of the littoral State out over the coastal sea can not be measured in a way that is rational and does not dismay the tendencies or practice of custom.

It is, on the contrary, by conceiving the littoral State as a simple owner of servitudes on the sea, that this harmony with practice can be established.

In this new conception, what are to be the exact frontiers for the rights of the littoral State? By what rule are they to be fixed? Since the rights in question are rights of servitude, it is necessity which begets them, for, except in case of a convention, it is not necessary that the liberty of a domain be confined unnecessarily. But it is also a necessity which is going to serve as the measure for the rights of which it is the principle. Where will the servitude of non-approach for belligerents to the borders of a neutral State commence? Where will the servitude of customs and sanitary inspection begin? It is in the limit of necessities. But, as we are here concerned with distinct points of view, before even having determined these necessities, we can say that the limits of the territorial sea, varying with them, will change in all probability with the nature of the rights claimed.

Such is the consequence of our system. With it there is no single fixed limit, at which necessarily begin all the powers of the littoral

¹ Cf. *supra*.

² *De la République*, I, c. x.

³ *Discursus legales de commercio*, disc. 186, no. 1.

State. In the system of sovereignty, for which the territorial sea exists by itself, as a concrete entity, its limits must be the same from whatever point of view one looks. Since the cutting of wood (art. 105 of the French forestry code) is rightful for nationals over the whole territory, fishing is equally reserved for them over the whole extent of the maritime sovereignty. Since the police and justice are exerted over the whole land domain, they must likewise reach the frontiers of the maritime sovereignty. Fishing, police, jurisdiction, military neutrality, sanitary or customs surveillance, the rights of the State, based on the sovereignty of the maritime territory, should extend to the confines of this territory, as the rights of the State extend over the land itself to the extremity thereof. One may question the limit; but that which is adopted should be the same for all rights of the littoral State. It is thus that the Institute of International Law wished to proceed in its Paris session of 1894, by dismissing proposals, which, in the course of preliminary proceedings, had vainly attempted to break up the unity of limits, for this unity is necessary in the system of sovereignty.¹

On the contrary, in the system we are outlining, the solution is susceptible of very great flexibility. The rights of the State on the territorial sea are of two kinds: 1, Accidental rights, as fishing, which are not derived from the necessities of the coastal situation; 2, military, sanitary, and customs servitudes, which are, on the contrary, derived directly from that necessity. Now, as to the first, which are not bound to the natural notion of the rights of the littoral State, but which are connected with simple agreements, it is clear that they can have the most variable limits; and as to the others, why ascribe to them the same limits, since they form so many distinct servitudes? Just as all servitudes, passive or active, of one estate upon another do not necessarily have an end altogether at the same point, so the different rights of the coastal State, consisting of so many distinct servitudes, are all susceptible of an independent limit. In this system the right of fishing can stop at one distance, the right of customs protection at a second, the right of military protection at a third.

Such is the principal divergence of the system of servitude from that of sovereignty.

Which of the two is that toward which practice is tending? Toward that of sovereignty with a single limit, or toward that of servitudes with as many limits as distinct rights?

It is in favor of this latter that laws and treaties show preference. While theory considers the territorial sea as a unit in its limits, since it is one in its nature, one under the sovereignty of the littoral State, practice experiences no scruple in substituting for this single

¹ *Annuaire de l'Institut de droit international*, vol. 13, p. 137.

frontier numerous ones. In France, at the time when the national sea had certainly not been separated from the territorial sea, the right of justice stopped with the harbors and roadsteads,¹ whilst the right of fishing stipulated in the treaties and later in the internal law² advanced to 3 miles, while finally the customs zone, which on land extends to the interior for 2 myriameters, goes seaward, by analogy, the same distance. In England, where the right of fishing and that of justice stop both at 3 miles, the right of customs protection passes them and reaches 4 marine leagues (12 miles), according to the celebrated provision of the Hovering Acts of 1736 and 1784, adopted in 1797, 1799, and 1807 by the United States.³ Here is a contradiction which has struck the writers, Dana, or Wheaton,⁴ says that these acts should be rejected as obsolete. But this is not the question. It is sufficient that this provision has existed at a time when the right of fishing stopped at 3 miles, so as it may be proved that practice was not averse to giving different littoral rights different limits. That is so true that in a recent text, England seeks to extend to 30 miles her right of regulation of the fisheries on the coast of Scotland.⁵ The distance is too great. It is an exaggeration. But it is characteristic of exaggeration to display in full certain ideas, which, without them, would risk passing unnoticed, and this only shows well that, for the littoral State, its right on the neighboring sea is susceptible of as many separate limits as it has distinct objects. It is in virtue of the same principle that Norway fixes at 4 miles the extent of her fishing monopoly, according to an ancient rescript of June 18, 1745,⁶ while she stops by the same text at a marine league or 3 miles the zone of neutrality, because cannon range at that time was not greater. This same tendency to give to territorial waters different limits, according to the rights to which the littoral State makes pretensions, is again found in the provision by which, in the terms of the arbitration of Paris of August 15, 1893, the United States protect pelagic sealing to 60 miles from the shore.⁷ When, in the war of 1870, Chile sought to prevent belligerent ships which had revictualled in her ports from engaging in battle before 150 miles distant from her coast, what did she do but assign to her coastal waters, in a special interest, an unusual limit?⁸ Let it not be pre-

¹ Opinion of the Conseil d'État of 1806. See Rostworowski, in the *Annales de l'École libre des sciences politiques*, 1894, *supra cit.*

² Law of March 1, 1858. Cf. *supra*.

³ Lawrence, *Principles of international law*, 1895, p. 176.

⁴ Wheaton, *International law*, Dana's ed., 258, note.

⁵ Sea Fisheries regulation (Scotland) act, 1895, art. 10, sec. 1. See notice, translation and notes by E. Alix in the *Annuaire de législation étrangère*, 1896, p. 48 et seq.

⁶ Aubert, *La mer territoriale de la Norvège*, in *Revue Générale*, vol. 1 (1894), p. 482.

⁷ Tribunal arbitral (sentence, déclarations et protocoles) des pêcheries de Behring, Paris, 1894, p. 192.

⁸ Admiral Bourgois, *Les torpilles et le droit des gens*, in the *Nouvelle Revue*, July 1886, p. 306.

tended then that the territorial sea is closed by custom within precise limits, which can never be exceeded. There are variable limits with each of the interests under consideration: One limit for prohibition of battle, one limit for the customs, one limit for fishing, one limit for justice; and in the same category limits can still vary: there is one limit for fishing and another for the policing of fishing, there is one limit for battle between foreign ships which have not had need to provision in the ports of the coastal State, and another, more developed, for those to which a stop in these ports has been necessary. It is not a single limit, it is a series of numerous limits that the rights of the State meet in coastal waters, each according to its nature. This is not the rigid fixity, the constant contours, always identical with each other, that the theory of sovereignty demands; it is a series of different zones, which, from the shore toward the open, stretch out by degrees. And, if practice differs on the exact limit of the rights claimed, it never hesitates in dividing coastal waters into a series of different zones. These ideas of practice are not unreasoned errors; they are so strong and so rational that they have found their echo in doctrine. They have penetrated the English association for the reform of the law of nations, where Mr. Andrew R. Gordon¹ has proposed, while stopping at the 3 miles the limit of exclusive fishing, to accord to the littoral State the regulating of fishing up to 9 miles. They have likewise come before the Institute of International Law. In the meeting at Geneva (1892)² preparatory to that of Paris, M. Aubert had already proposed to extend the jurisdiction of the littoral State over the fisherman to a distance greater than the monopoly of fishing. The Institute did not think that it should accept this system, which its committee had opposed.³ But in spite of its desire to give to the territorial sea, by its subjection to sovereignty, the single unity that the right of sovereignty imposes simultaneously to all its attributes, the Institute was forced to distinguish the zone of fishing and of customs from the zone of neutrality, which it permits the littoral State to extend to cannon range from its coasts, on its own declaration, while in all other respects the limit of the territorial sea is always, according to it, 6 miles (Article 4 of the Regulations).⁴ Thus the Institute itself is constrained to recognize that there is not one territorial sea, but a series of territorial seas. The *régime* of the territorial sea is not a single *régime*, it is a succession of different *régimes*, the limit changing with the right invoked. Now, since there can not be several territorial seas, any more than several land territories in one State, it follows that there are, not several terri-

¹ Report of the Association, session of Brussels, pp. 13 and 14.

² *Annuaire de l'Institut de droit international*, vol. 12, p. 145.

³ *Ibid.*, vol. 13, p. 137.

⁴ By the proposal of Messrs. Desjardins and Perels (*ibid.*, vol. 13, p. 300).

torial seals, but several littoral rights over the free seas. We are led by treaties and laws, and even by the pure doctrine of the Institute of International Law, to the system that we present of a group of distinct servitudes belonging to a littoral State over the common domain of the sea.

In law, from the viewpoint of principles, it is the only rational system. In fact, from the practical view, it is the consecration of traditions followed.

This proof made, we can follow in all security the system of coastal servitudes (not waters) in this consequence that the limits of the territorial sea vary according to the nature of the different rights claimed by the littoral State.

There remains now only to state the limits of each of these rights by itself.

Exclusive fishing, an unnatural right of States, deriving its source not from their coastal situation but from their particular conventions, will receive from them variable limits. Thus it is explained that the littoral States of the Adriatic admit it up to the distance of 1 mile (Austro-Italian treaty of Dec. 6, 1891),¹ the littoral States of the North Sea up to 3 miles. At the same time, this understanding permits giving to Norway, without generalizing, the greatest limit for fishing (4 miles), which she has traditionally claimed,² and which likewise the twisting configuration of her coast, cut up by fiords and lined by islets, makes particularly desirable. If until now Norway has been unable to obtain the particular treatment she demands,³ it is entirely because of this idea that the fisheries are covered by a coastal sovereignty, for in that case she ought to have in respect to this sovereignty with all States a uniform limit. With the conventional and relative aspect, on the other hand, that the right of fishing takes under the hypothesis of simple coastal servitudes, Norway gets satisfaction; once more the practical flexibility and usefulness of the system are thus demonstrated.

With the right of fishing disposed of, as an accidental one, there remain the three properly coastal servitudes of neutrality, customs inspection, and sanitary prohibitory measures.

At what point in the approaches of the neutral State should hostilities between belligerents cease?

Here it is the cannon that is to measure the right of the State. To be sure, we have attacked this system as one of numerous inconveniences; but none exists here. We have remarked that this meas-

¹ The communication of Mr. Strisower to Mr. Barclay, who reported the project on the territorial sea at the Paris session, in the *Annuaire de l'Institut de droit International*, vol. 13, p. 135.

² Aubert, *La mer territoriale de la Norvège*, in the *Revue Générale*, vol. 1 (1894), p. 432.

³ Cf. "The Hague Conference," in the *Recueil général de traités*, 2d series, vol. ix, p. 510.

ure by cannon range constituted a reversion to Grotius, a menace to liberty on the sea, and, through the steady enlargement of the territorial sea, a challenge to modern ideas. But is it a retreat for the law to limit with the advance of artillery the extent of battle fields? If it is an historical misconception to restrict fishing on the high seas because of the increasing power of coast artillery, is it also an historical misconception to restrict the theater of war? We have said that by the rule of cannon, France and England, near Calais, would be two States, both sovereign over a sea belt of 4 miles, because on both sides the coast batteries could sweep the belt with their cannon; a double sovereignty which is impossible; but where is the impossibility, if, in this same belt no State can battle without violating the right of France or of England, since this right has not the nature of sovereignty, which is exclusive, but of a servitude which can be a common one? Finally, we have said that the right of the States could not change with the power of arms, which is true of police, of fisheries, and of justice, to which progress in artillery is a matter foreign, but which is no longer true of the protection of the shore from a combat on the sea, since the danger of receiving injury from one increases directly with the progress of artillery. As it would have been unjust to fix all the rights of the littoral power by cannon range, so it is in the same degree just to fix by this rule its particular right to keep belligerents away from its coasts.

However, it is necessary to have an understanding as to what the cannon are, whose range is to measure here the right of the littoral State. It is not the cannon of batteries erected on the shore; it is those of warships, for it is they alone which threaten the littoral State. Thence flows a great series of consequences, which, by happy coincidence, are all to be found in actual use at the present day, so that our hypothesis finds support in them. First, in the system of sovereignty, it is from the high-water mark where the batteries are placed that the distance is counted; in ours, it is from the low-water mark, where projectiles can already threaten the littoral State, that it should be measured. Such, briefly, is the solution admitted. It is this one which is accepted notably by the *Territorial Waters Act*,¹ the convention of The Hague of May 6, 1882,² and the Paris regulation of 1894,³ while high-water mark is taken as line of departure by the old French ordinance on the marine of 1681, imbued with the idea of sovereignty, and by the majority of writers because they also

¹ One marine league of the coast measured from low water. Cf. the text in Nelson, *Selected Cases, Statutes, and Orders of Private International Law*, 1889, p. 295. See the French translation in the *Annuaire de législation étrangère*, 1879, p. 73, and the Italian translation in G. Diena, *I tribunali delle prede belliche*, p. 151.

² "Measured from the low-water mark" (Article 2). See G. F. Martens, *Recueil général de traités*, 2d series, vol. ix, p. 557.

³ *Annuaire de l'Institut de droit international*, vol. 13, p. 324.

present the rights of littoral States as sovereign rights.¹ Others, however, equally admit low-water mark to be the line to be measured from,² and the latest of the writers who have written on this subject, W. Schücking,³ accepts this system as being the simplest, although he advocates the idea of sovereignty. Is it not curious to see writers who favor sovereignty desert on this point the natural consequence of their principle? In the second place, protection of the shore requires that account be taken, not of the real range of gunshot, but of the spread which can happen during combat, a spread which competent experts fix at three or four thousand meters,⁴ which, by exaggerating the limit with the intention to protect easily understood, allows us to preserve, for the zone of neutrality the limit of the marine league (5.556 miles), so ineradically rooted in practice and which appears to us here as quite sufficient for protection of the neutral shore in time of war. Finally, if it were wished, for still greater prudence, to keep to the exact gun range and not the possible spread, it is on the force of naval artillery that calculation should be made, which would be a guaranty against excessive extension of the territorial sea, because naval artillery is inferior to coast artillery in respect to range. This is the only consequence of the coastal servitude of neutrality which may be wholly new. All others are already in practice.

To what results is this theory of coastal servitudes of the littoral States going to carry us? We already know that the customs belt may be different from the military zone. It can be of either greater or less extent. But exactly what will it be? It is for the necessities of customs securely to fix it. For a long time the customs collectors did not dream of carrying on their investigations on the waters near the coasts. Although surveillance of interior territory, adjacent to the land frontiers, was early organized, it was only considerably later that there was taken up a field of customs administration on the sea, where certain doings constituted infractions of customs rules, just as in the interior deposit and transfer of goods were, within a given radius, subject to special measures in order to suppress fraud.⁵ As this idea of an interior customs zone was rapidly developed from the coast landward, so the idea of a symmetrical customs zone was slowly extended seaward. The zone on land began

¹ See in this sense Jakobsen, *Seerecht des Friedens und des Kriegs*, Altona, 1815, pp. 580 and 585; Kaltenborn, *Seerecht*, 1851, vol. II, p. 341; Perels, *Das internationale Seerecht*, 1882, p. 24; Stoerk, in the *Handbuch des Völkerrechts* of Holtzendorff, vol. II, p. 411.

² See Wheaton, *Éléments du droit international*, 1874, vol. I, p. 168; Attlmayr, *Die Elemente des internationalen Seerechts*, Wien, 1872, p. 5, who measures from the lowest water mark, because it is from there that it is navigable. See especially Travers Twiss, *The law of nations*, 1861-1863, vol. I, sec. 172; Phillimore, *Commentaries upon international law*, 2d ed., vol. I, sec. 198; Giulio Dena, *I tribunali delle prede belliche*, p. 148.

³ Schücking, *Das Küstenmeer*, p. 14.

⁴ Godey, *La mer côtière*, p. 16. The writer is Commissioner of Marine.

⁵ Béquet, *Répertoire de droit administratif*, 1896, v. Douanes, vol. XIII, p. 207.

as early as in the reign of Francis I.¹ It is only in the eighteenth century that it appears on the sea, where for the first time it is seen in the Carlier lease of August 19, 1726 (article 395). Continued by the lease of Forceville of September 16, 1738 (article 391), it definitively entered into French customs legislation (loi of 4 Germinal, Year 2, Article 7).² It is the more legitimate to consider this right on the free domain of the sea as a right of servitude, because such is precisely the character it presents on shore, where all writers admit that it exists as a right of way in servitude for the benefit of the customs.³ Just as the needs of the customs service impose a restriction on ownership by private persons along the frontier so they require a restriction on the free use of the sea by the community of States. But what extent shall be given this servitude? The question is a very delicate one. What is exactly the region where the customs shall control to prevent clandestine unloading? This is the question which must be answered when the rule by cannon is rejected with the sovereignty of the littoral State. But, if this question is at first embarrassing it is easy to settle it by a comparison of the land zone, where the customs fear fraud, with the maritime zone to be determined. The land zone, being interior, is fixed in all sincerity, without other thought than the wish to prevent contraband trade. It is therefore its extent which fairly should serve to fix the zone seaward. Now, this zone is for France two myriameters on the land side. As it ought to be the same on the ocean side, it is at 20 kilometers that it is fixed, while the zone of neutrality in our system stops at 3 miles; and we adopt this solution with the more satisfaction because the 4 marine leagues of the Hovering Acts⁴ end likewise at 20 kilometers (exactly 22).⁵ But for the very reason that this distance is based on customs necessities, independently of the power of cannon, it is from low-water mark that its extent will be measured because the 4 marine leagues of the Hovering Acts⁴ end likewise at 20 can already be made (in this sense Cass. civ. of France, 9 messidor, year 7),⁶ although no battery can be located there to stay. By accepting this system our customs jurisprudence rejects the system of sovereignty to unite itself with that of servitude.

Finally, for sanitary policing, at what limit is it going to stop? With sovereignty for principle and cannon for measure, infected

¹ Béquet, *supra cit.*, p. 211, note 1.

² Béquet, *supra cit.*, p. 392.

³ Vallin, *Commentaire de l'Ordonnance de 1681*, II, tit. vii, art. 2; Plocque, *De la mer et de la navigation maritime*, No. 154; Isambert, *Des marches le long des bords de la mer*, sect. II, c. II, liv. I, sec. 8; Gaudry, *De domaine*, vol. I, No. 91.

⁴ Lawrence, *Principles of International Law*, p. 176.

⁵ An order of the Austrian minister of finance of March 23, 1881, cited by Schücking, fixed the customs belt at 4 marine miles. See Schücking, *Das Küstenmeer*, p. 12.

⁶ Béquet, *supra cit.*, p. 208.

ships could be kept on the high sea without coming nearer than the range of cannon, a monstrous system, since it would keep the ship on the open sea, exposed to every violence of the ocean, without allowing it to seek shelter under a coast. Measured by the necessity of the State, the simple servitude of sanitary protection is only carried to a small distance from the coast, because contamination is not to be feared except in case of disembarkment, and this a narrow interval of water suffices to prevent.

Such are the moderate consequences, strictly and solely calculated on the necessities of coastal security, to which, by deduction after deduction, covering the various interests in question, we are finally brought by the theory which we have outlined. Far from not fitting in with this theory, these consequences verify it and strengthen it. Almost all are already in use; those which are not yet fully accepted are tending to become so. What obstructs their acceptance is that old conception of the territorial sea as a distinct entity, under the sovereignty of the littoral State. Too long the science of the rights of the littoral State has been prisoner to it. Hampered by an incorrect rule which embarrasses it in its movements, domestic and international practice tend now to break the bonds by which error confines it. That which has contributed to the power of this rule is its highly doctrinal character. In a law somewhat free, with few texts, and with broad ideas as in the law of nations, theoretical views have tried to play too great a part. Thus has been created in defiance of the needs of practice, against right and against nature, this idea that the littoral State is sovereign of the territorial sea, as if it existed a territorial sea in the physical régime of seas, as if it were possible to exercise empire over it in the juridical *régime* of sovereignty. But, opposed to this system, its consequences protest. In denying that the territorial sea is a distinct sea, and in recognizing not sovereignty but simply coastal servitudes for the littoral State, we have unfortunately no authorities to invoke. This system has support neither in tradition nor in doctrine, but it finds it in its practical effects. It is under their patronage that it places itself, for it is upon observation of them that it is framed.

LATOUR: *La Mer Territoriale au Point de Vue Théorique et Pratique.*
Paris, 1889.

CHAPTER I.

Section I, page 7. The notion of the territorial sea.—The earth is partitioned among numerous States, divided from one another

by either natural or artificial frontiers.¹ The former are supplied by the shores of the sea, the summits of mountains following the dividing line, etc.; the latter consist of conventional lines; thus the rights of the coast States over the adjoining sea extend beyond the shore to a certain distance which it is claimed must be the range of cannon; this portion of sea is styled territorial² and by fiction is considered to be the continuation of continental territory.

This fiction is justified on various grounds, which M. Perels sums up as follows:

First. The security of the coast State demands the exclusive possession of the marginal sea.

Second. The supervision of the vessels which enter, depart, and sojourn is required to insure good policing and the development of the political, commercial, and financial interests of the coast State.

Third. The control of territorial waters is of use in affording means of existence to the population that lives along the coast.

Section II, page 8.—Three principal reasons, therefore, justify the sovereignty of the coastal State. The enumeration of these reasons is all the more important and worthy of mention at the beginning of the essay, as they contain the fundamental principles which will serve to determine the nature of the rights of the state to the territorial waters and the expanse it is proper to assign to it.

The treaties have necessarily provided for and regulated the possession of territorial waters so indispensable to the development of international commerce and the trade of maritime States. This exception to the principle of the freedom of the seas is after all but a confirmation of it, and it is not a question here of exercising an actual property right of *dominium*,³ as alleged by Schiatarella in his *Del Territorio*,⁴ but an *imperium* which permits of taking steps for the protection of the coasts, navigation, and commerce.

It is possible that the name of *Territorial sea* may have caused unfortunate consequences in this respect; in fact, the word itself implies that the territorial waters are in some way an extension of the continental territory and must be assimilated to it. Hence, certain authors concede to the coast State the right of ownership or absolute sovereignty over that portion of the sea, and for them the expression of *territorial sea* is not lacking in accuracy.

The territorial sea is that which washes the shores of a State and serves, so to speak, as a boundary line. That is the area of the open

¹ Of late there has been a mention of special frontiers styled Social Frontiers. It is said that economical and social conditions of countries must be taken into account in the demarkation of boundaries (V. Inama Sternegg, *Tübinger Zeitschrift für die ges. Staatswissenschaft*, vol. xxv, fasc. 3 and 4.)

² *Küstenmeer* or *Territorialmeer* in Germany, and *Territorial Waters* in England.

³ See *Code général de la Prusse*, vol. II, 15, 80, and a decree of the Supreme Court of Prussia dated November, 1866.

⁴ P. 5.

sea over which the State can, from its coast, command respect of its power.

Certain authors give the special name of *littoral seas* to those parts of the sea which wash the shores of a State, and to gulfs, roadsteads, bays, and in general the bodies of water surrounded by the possession of the State, *territorial seas*. But this distinction is not admitted by all authorities and it is essential to recognize that littoral seas are territorial seas in that they form part of the territory.

Therefore, neither of the names, *littoral seas* or *adjacent seas* must be used, as the authorities and treaties themselves have sanctioned the term *territorial sea*, which, from a certain point of view, defines more closely the rights of a coast State. "That portion of the sea over which the State can, from its coast, command respect of its power, that is to say, that strip of the sea extending as far as the range of cannon from the shore is included in its territory," says Bluntschli.¹

This assimilation is not contrary to law, and it is not a question here of the waters of the high seas whose use is inexhaustible. The coast fisheries should not be left to the discretion of the various nations; navigation and national commerce should also be safeguarded; and as very well put by Hautefeuille.²

To admit the freedom of the territorial seas would be to destroy the present basis of international commerce and deprive most of the maritime States of immense advantages to be derived from their trade.

Every State must be permitted to secure its conservation and independence; therefore, things which could by unrestricted use prove injurious or dangerous, may be appropriated.³

Section III, page 11.—The State, therefore, has a certain right to the adjacent sea, and the natural sanction of that right takes the shape of the use of *vis armata*, and is spoken by the voice of cannon. While the nature of this right can be discussed, it must be acknowledged that most of the authorities agree in attributing to the coast State the right to regulate and even reserve its coastwise trade⁴ and the inshore fisheries for its citizens or subjects, to place its navigation and customs under a police system, exercise a certain jurisdictional power, to set up maritime rules and prohibit all acts of hostility in neutral waters.

But certain writers who accept the *dominium* doctrine go so far as to permit the coast State to prohibit navigation of the territorial

¹ Bluntschli, *Droit international codifié*, Article 302.

² Hautefeuille, *Droits et devoirs des nations neutres*, tit. 1, chap. III, sec. 1.

³ Vattel *Le droit des gens*, liv. 1, chap. xxiii, par. 288.

⁴ The reservation of the coastwise trade for the benefit of the citizens or subjects of the State can hardly be extended beyond the so-called "small" coasting trade that is carried on from port to port in the same sea.

seas, levy tolls, exercise absolute jurisdiction. The leading authorities who have upheld this opinion are Vattel, Wheaton, Hautefeuille, de Rayneval, Massé, Pradier-Fodéré, and Fiore;¹ some of the arguments brought forth are specious, others are of no great weight; for instance, de Rayneval² contends that the bottom of the sea near the coast can be considered as having once formed part of the continent and can, for that reason, be considered as still being part thereof. Geology is an important science which renders great service but seems little apt to supply legal arguments; moreover, we may add, the depth of the marginal sea is very variable and uneven, and that is a very uncertain foundation upon which to base the measure of territorial seas.

Hautefeuille³ in his work entitled "*Droits et devoirs des nations neutres*" cites several arguments in support of this theory, the first of which appears unimportant, we might even add, inaccurate:

The territorial sea being considered an accessory, and an accessory having to follow the principal, it must necessarily become the property of the owner of the land.

We can not maintain that the territorial sea is an accessory to the land; but the second argument put forth by this writer is far more conclusive⁴ and has been sustained by other authorities:

The territorial sea is subject to occupation and possession, and its use is not inexhaustible.

While it is true, as claimed by M. Pradier-Fodéré, that the sea is useful to the nation that owns the coast, the assertion that its being used by all is absolutely injurious to it is untrue; in fact, while the coast fisheries are to be reserved for the benefit of the coast State, it must be admitted that innocent transit must be granted other States. We will even add that it is not possible truly to take actual and physical possession of the territorial seas.

Certain writers frequently use the words *ownership* or *possession* without ascribing to them any definite meaning, and M. Pradier-Fodéré⁴ himself says that nations consider "territorial seas as their property and control them by virtue of their sovereignty, as they would control any other part of their territory." The instance of Denmark foregoing for a pecuniary indemnity its right to levy toll in the Baltic is little conclusive; this indemnity represents before all

¹ Fiore, after agreeing to the "dominium" theory in the earlier editions of his "*Traité sur le droit international*" (Book II, Chapter III, title 1, p. 369), rejects it in his "*Nouveau traité*," translated by Antoine (1885), No. 302, and restricts the *dominium* to the limits which the safety and defense of the territory demand.

² De Rayneval, *Institutions du droit de la nature et des gens*, Book II, Chap. IX, section 10.

³ Tit. 1, Chap. III, sec. 1.

⁴ Pradier-Fodéré, *Droit international public*, section 627.

the cost of establishing and maintaining lighthouses, buoys, and other life-saving devices.

If we admit the *dominium* theory, and especially if we apply all its strict and logical consequences, we reach an unadmissible condition of things. The coast State can no more prohibit innocent transit across its territorial waters by other States than it can exercise an absolute right of jurisdiction over them. This theory is false in its premises and dangerous in its final consequences. Therefore we deem it our duty to maintain that the territorial sea is subject to the *imperium* of the coast State. Such is the opinion of Perels, who concurs in the contentions of d'Ortolan,¹ "It is not claimed to exercise a right of ownership, *dominium*, such as that belonging to a State on the shores proper; it is a matter of *imperium*."²

Against this proposition the argument has been made that the State holds at once more and less than a sovereign right,³ and in its support Bluntschli's opinion has been quoted and at the same time given a wider scope. It is claimed on the one hand that the right of jurisdiction is not absolute, while on the other hand the coast State possesses certain reserved rights, certain monopolies which seem to overstep the ordinary limits of *imperium*.

It is useless to acknowledge the existence of such a right *sui generis*; *imperium* is the right to command, it is the sovereignty, it is the authority conferred upon a State to safeguard its liberty and independence and insure its safety. *Imperium* has, therefore, no well defined limits, it is subject to extension or restriction, the scope being marked out by peculiar circumstances and individual interests. Furthermore, this disquisition is theoretical rather than practical, and the last two mentioned systems lead to like or nearly identical results; therefore in defining the territorial sea we shall omit all specific terms which can not easily be translated into our French language, and so we will say: The territorial sea is the sea adjacent to the shore over which the coast State can from the water front revert to the use of arms to protect its power, and defend its territory and shores, insure the safety of its inhabitants, and safeguard its fiscal and commercial interests.

Section IV, page 14.—After having recognized the right of the State to the territorial sea, and having justified it from a theoretical and practical standpoint, there remains only for us to search for the true rational origin of that sovereignty. We will find it is based on the principle of nationality and that this right of sovereignty

¹ Ortolan, *Diplomatie de la mer*, vol. 1, p. 157.

² Perels, *Droit maritime international*, translated by Arendt, p. 26.

³ Nuger, *Des droits de l'Etat sur la mer territoriale*, thesis for doctorate, 1887, p. 159 (Paris).

inherent in the constitutions of the States is a necessary condition of their independence.

In a recent work¹ entitled *The law of nations considered as independent political communities*, Sir Travers Twiss, ex-professor at Oxford University and counselor at law to the Queen of England, analyzes the recent international acts and admits the necessity of opposing the law of force and adapting facts to law, but not law to facts. To realize the object of the international society, the States must be free and independent; in fact, Hobbes tells us that no community can have the standing of a State, if it is incapable of maintaining its independence by its own internal forces against all outside attacks. Equality of rights is the necessary result of independence; the strong and the weak have the same rights and the same duties; and that which is granted or denied one nation is granted or denied to the other. Independence being the first attribute of nationality, a State can do anything necessary to maintain its independence; there it is the question of absolute right; it is for this reason that it can arm and fortify its territory to the extent necessary for protection. But, if these warlike preparations were excessive, the other States could demand explanations within the limits of their own safety; the application of this theory often gives rise to practical difficulties which the law of nations can not avoid; so that a nation which desires war can easily pretend that it is acting in self-defense, when, in reality, it is seeking a pretext of aggression.

Carnazza-Amari has clearly formulated the fundamental principles of territorial² sovereignty. Each State is separated from the other by limits more or less natural, but which must be precise and well defined. Nations must have a territory which satisfies their needs, which guarantees their existence and their independence, and upon which their commerce can be freely carried on. They possess it to the exclusion of others, and the State to which they belong exercises over it, if not a right of international ownership, at least a right of territorial sovereignty.

Certain properties destined to public use, such as the shores, harbors, and roadsteads, are included in the public domain, while being in a certain measure public property subject to special laws; other properties, without veritable appropriation, are nevertheless under the jurisdiction of the coast State which exercises territorial sovereignty over it; such are the territorial waters of the sea.

¹At the session of February 5, 1887, of the *Académie des sciences morales et politiques*, M. Arthur Desjardins lectured on the work of Sir Travers Twiss, setting forth its interest and importance to the best advantage.

²Carnazza-Amari, *Traité de droit international public en temps de paix*, vol. II.

The existence of an interstate or so-called *international* ownership must be recognized; it consists in the power that each State has to make its subjects cultivate its territory, and of using it to the exclusion of others, and the exclusive right of jurisdiction over it, and the corresponding obligation of foreigners to respect these attributions. In regard to the latter, the State is not owner, it is only sovereign of the territory, and it is only under that head that it can be claimed that the territory belongs to it; it must cause private property on this territory to be respected and at the same time it has the right to enforce its laws and exercise its jurisdiction.

It is useless to enumerate here all the rights of the state within its territory; let us merely state that it can freely exercise its sovereignty over it, and confining ourselves to that which deals with territorial waters, recognize its right to fly its flag freely, to prohibit hostile acts between foreign belligerents, to make laws that apply to foreigners as well as to the natives, to exercise its jurisdiction, to maintain *vi et armis* the exercise of its rights, to make special laws for navigation, customs, and fishing; in other words, to exercise what is rightly known as territorial sovereignty.¹ This sovereignty, says Carnazza-Amari, can be defined as follows: The right to establish, enforce, and execute laws within the territory of the State. Its distinct mark is universality; it is a question of absolute power, since it is applicable to all states and of a negative duty since the free exercise of foreign territorial sovereignty is not to be molested.

Sovereignty naturally implies possession to the exclusion of other States; but this exclusion must be necessary and legitimate and concerns only such things as are exhaustible otherwise it would become an illicit monopoly and abuse the riches of nature. In case of something partly exhaustible and partly inexhaustible, the right of sovereignty shall be limited to the exhaustible portion; thus foreign vessels may navigate territorial seas without, however, having the right to fish; in fact, the wake of the ship disappears a few minutes after its passage and the rights of the shore holder remains intact. This would not be the case were the foreigners permitted to cast their nets in territorial seas, inasmuch as they might exhaust the fisheries, whose resources should benefit the inhabitants of the coast. In principle, ownership and territorial sovereignty presuppose each other. Such is not the case with territorial seas, inasmuch as it is a question of elements which are not subject to the true right of ownership.

Territorial sovereignty is based on human nature, on the principles of nature; indeed, in order to exist, live, and develop a nation requires a territory on which to exercise its *imperium*. The right of sovereignty is original because it becomes effective simultaneously

¹ Bluntschli, *Le droit international codifié*, sec. 162.

with the constitution of the State; it is absolute because it applies to all the peoples; it is abstract in the sense that it requires a physical act to attest its existence. This act is the result of actual occupation of the territory over which sovereignty is exercised; the deed must therefore go with the intention and an effective appropriation is necessary. It is admitted that the appropriation of the seacoast also includes the surrounding land, both forming but a single whole;¹ in fact a people could not exist near the sea if it did not have the right to draw its food from the surrounding lands.

Territorial sovereignty resides in the nation, and this is a matter of inalienable rights as is the sovereignty itself. But war may break the equilibrium previously existing between two States, and this sovereignty may be modified or transferred by treaty, sale, exchange, cession, or prescription.

From the principle of liberty and independence the States derive their right of ownership or of sovereignty over their territory; in fact Cousin tells us that ownership is the necessary result and the condition of liberty; Mr. Renouard states that they call for and uphold each other.² The eternal harmony of things has placed beyond the reach of individual ownership the principal things without the enjoyment of which life would be impossible for those who would be excluded from them, if they were appropriated; it is for this reason that international life demands freedom of navigation in the territorial waters of the States. Such is the principle stated by Locke as follows: Each one must possess that which is necessary to his subsistence.

Territorial ownership is the result of tacit contract or again of occupancy: It constitutes a natural right or at least proceeds from the innate right which is freedom.³

In principle each State exercises its sovereignty over all the territory which belongs to it; but often half civilized States, or savage tribes yield to great maritime nations all or a part of the coast of their country and draw up with them treaties of friendship or protection. In the absence of special agreements, each State is owner of the coast and exercises its rights of sovereignty over the territorial waters which surround it.

Chapter II, section I, page 20.—Determination of area of the territorial sea along the shore: (1) Along the coast, properly so called; (2) at the opening of salt lakes; (3) at the mouth of streams and rivers.—It is now necessary to determine in some positive way the limit of these waters, and we will see that this is a rather difficult task

¹ Bluntschli, *Le droit international codifié*, Article 282.

² See also de Laveleye, *De la propriété et de ses formes primitives*, p. 383, and *De la liberté du commerce international*.

³ Dalloz, *Jurisprudence générale*, see the word "property."

which has given rise to many discussions and has become one of the most disputed questions of international law.

There are two distinct points to be considered: Where do territorial waters have their beginning from the shore and from there how far do they extend?

The answer to the first question is the determination of the marginal sea. Roman law¹ recognized the highest tide as the limit, while according to more recent authorities on international law, and particularly to conventions relative to fisheries, the low-water mark is taken as the basis. Certain authors, according to the condition of the tide when the act is performed, and finally some authorities, like Wheaton,² draw the limits of the sea from the point at which it becomes navigable. There is nothing to justify this solution. Before going deeper into the study of this question it must be admitted that if a fixed area is not determined for territorial waters no difficulty will be possible, and this sea will comprise all the waters where the *imperium* or the *vis armorum* can be exercised,³ and if certain treaties set line limit at low-water mark that will be the limit to be respect.⁴

The study of territorial waters belongs not only to international law; it is also connected with municipal law, and especially administrative law, in what concerns the shores, their ownership, and their limits.⁵

We must first regretfully note that the texts which regulate this matter are few and incomplete. The ordinance of 1861 defines the seashore, then in 1852 certain new legislative provisions may be referred to upon which the decisions of the minister of war and of the minister of public works are based. Jurisprudence has supplied the deficiencies of the law, but it is noteworthy that the Council of State does not agree with the Court of Cassation.

Fixing the boundary in this matter is all the more difficult, in that it is founded on various circumstances; that it depends on facts of great variations; sometimes even the question becomes complicated and before trying to discover where the shore lies it is necessary to establish a distinction between the sea and a river at its mouth.

While riparian proprietors may lose or gain ground, those on the seashore can only lose, since all lands alternately covered and uncovered by the sea are assigned to the State by article 538 of the Civil

¹ Loi 112, Digest, liv. L. tit. 16.

² Wheaton, *Eléments du droit des gens*, vol. 1, p. 168.

³ According to Perels, it is a line drawn from points along the shore where batteries may be erected which will not be threatened by high tide, even at the time when the waters are highest; however, extraordinary high tides should not be taken into consideration.

⁴ The definition has been confirmed by the British waters jurisdiction act of 1878.

⁵ Bona Christave, *Du rîage de la mer en droit romain et en droit français* (thesis for doctorate), Poitiers, 1872; Guéret-Desnoyers, *De la mer et de ses rivages*, thesis for doctorat Caen, 1876.

Code.¹ While the law declares that the seacoast forms a part of the public domain,² it did not take pains to fix the limits, and to obtain this data it is necessary to refer to article 1, title VII,³ of the ordinance of 1681 on the navy.

Will be termed seashore all that the sea covers and uncovers during the new and full moon, and to where the highest tide can spread over the sandy shore.

Valin prefers this definition, confirmed by the ordinances of the 27th of February, 1534, and of the 12th of February, 1596, to that given by the Roman law. "Est autem littus maris quatenus hibernus fluctus maximus excurrit." (Instit. Just., liv. II, tit. 1, par. 3.) It is certain that astronomic causes can modify, more or less, the height of the highest tide, but that is due to special conditions, exceptional and not periodic.

The ordinance of 1681 relates to the ocean, while Roman law concerned the Mediterranean Sea, where the influence of the tide is practically imperceptible; for that reason authorities and jurisprudence make a difference between the two seas and apply to the ocean the ordinance of 1681 and to the Mediterranean the Roman decision.⁴ It is not sufficient to take an isolated fact. Land forming part of the seashore is that which is generally covered by the high tides of March. In the Duval case mentioned here below in a note a special verification commission was appointed. In the year 1882, on the 16 of January, a circular issued by the minister of war compelled the delineating commission to give advices on the meteorological conditions during which observations are made and notably on the condition of the sea, the force of the wind, the height of the tide. It is not a question of drawing straight lines of demarcation; the sinuosities of the coast must also be taken into consideration.⁵

There are then certain differences to be observed between the ocean and the Mediterranean in determining the limitations:

1. The marine ordinance of 1681 applies only to the ocean, and the Mediterranean Sea is subject to the Roman law, and it is a question then of the winter high tide which is different from the high tide in March; furthermore, this theory, confirmed formerly by the Parliament at Aix, is still followed in our time by the council of State.⁶

¹ See *à contrario*, Article 556.

² Art. 538 of the Civil Code and Art. 1 of the law of Nov. 22, Dec. 1, 1790.

³ Book IV.

⁴ Merlin, *Questions de droit, rivage de la mer*, Dalloz, *Répertoire général*, Domaine public, No. 28; Plocque, *De la mer et de la navigation maritime*, No. 168, Fournier, *De la domanialité publique maritime*. *Revue maritime et coloniale*, 1878, vol. lvii, p. 576; Circulaire du Ministre de la Marine, 21 février 1853; Instruction du 18 juin 1864, paragraph 7; arrêt du Conseil d'État du 27 juin 1884 (aff. de la ville de Narbonne); arrêt du Conseil d'État du 10 mars 1882 (Duval et autres).

⁵ Instruction du Ministre de la Marine du 18 juin 1864, paragraph 9.

⁶ *Bulletin du Conseil d'État*, 1884, No. du 20 June au 11 July, p. 535.

2. We have already established that the Mediterranean has no tide, or at least a very slight tide in France, while the southern shore has more, because it is less indented. At Sfax, for instance, the difference in height between the high and low tides is of 1 m. 50 and of 2 m. 60 at the time of the equinox, while at Livourne it is of 0 m. 30, and at Marscilles the difference is very slight. So that in this case we can not take as a basis the presumed height of the tides as fixed by the tide gauge; wind, more than the moon, will exercise its influence on this height. However, to determine a shore line, one should not consider the tide during a tempest.¹

3. The Mediterranean does not receive like the ocean rivers of large mouths; most of them, like the Aude and Rhone, are lost in the midst of creeks and salt ponds; and so, according to Elisée Reclus, the delta of the Aude occupies an area of more than 20,000 hectares. The outlet of these creeks is usually called a *grau*.

Usually salt ponds are considered as forming a part of the sea with which they are connected. The ordinance of 1681 gives jurisdiction to the admiralty in fishery matters; the law decree of the 9th of January, 1852, assimilates these fisheries to the sea fisheries and the court of cassation, in its decree of the 24th of June, 1842, states that these are only a bay communicating with the sea by an opening more or less wide, and which is really an extension, an integral part of the waters themselves, and stocked with the same fish. However, this theory carries² exceptions and frequently difficulties arise relative to the question of the shores of these ponds. Generally it is established whether or not these ponds do or do not directly communicate with the sea; in the first instance they are considered as private property. These ponds exist most frequently on the shores of the Mediterranean.³ There are approximately 75 salt ponds, but the greater part do not have direct communication with the sea.⁴ Generally geologists explain the formation of these ponds by silts carried by the stream which flows into a tideless sea, and whose deposits are thrown against the shore by the movement of the waves. The bottom of these lakes

¹ *Parlement d'Alais, arrêt du mai 11, 1742.*

² Following a dispute, relative to the mouth of the Seine, several of the riparian owners addressed a petition and demanded the repeal of the decree of the 9th of June, 1877 (Bulletin du Conseil d'Etat, 22 June, 1881), on the ground of excessive power. The council of state ordered an inspection of the premises, which was made by several delegated state councillors; this is worthy of note, for it is the first time that a commission selected from the council has been charged with the duty of inspecting the premises.

³ See in this instance a memorial of Mr. Aucoc: *Compte rendu des travaux de l'Académie des Sciences morales et politiques, par M. Vergé*, year 1882, vol. II, p. 773.

⁴ See Lenthéric, *Les villes mortes du golfe de Lyon et la Provence maritime, Aperçu historique sur les embouchures du Rhône*, par M. Ernest Desjardins.

arise the most often and finally the lake becomes a communication, indirect or intermittent, with the sea.

Such is not the theory of the court of cassation. (*Cas. ch. crim.*, June 3, 1842.) (Daloz. See *Pêche maritime*, No. 47; *Cas. ch. des req.*, 22 Nov., 1865, *Daloz*, 1865, 1, 109.) Salt ponds form a part of the sea, they are formed by the same waters, stocked by the same fish. This was the case in the hypotheses of the decree hereafter mentioned, and of the decision of the 27th of June, 1884, relative to the pond of Gruissan. However, one should not generalize; it suffices to cite the decision of cassation of June 29, 1847. (*Daloz*, 1849, 1, 179.)

Even though the ponds and lakes communicate with the sea, they may be the property of individuals, and the prescription is irrevocable if the acts of concession are prior to 1566. So prefects who had invoked the decree of February 21, 1852, to declare certain property to be a public domain without reserving the right of third parties had their orders canceled. This question offers a field of wide interest, particularly as relates to fisheries and rules governing this industry. The production of titles has been exacted; in this respect let us mention the decree of November 19, 1859.

By the decision of July 30, 1864, supplemented by those of April 1 and December 20, 1865, the minister of the navy has recognized the rights of proprietors in certain salt lakes or ponds.¹ The acknowledged public ponds (and it is even necessary to reserve certain parts of many of these ponds) are those of Salses, Leucate, Lapalme, Bages, Sigean, of Gruissan, of Grazels, of Thau, of Ingril, of Pérols, of Mauguio, of Gloria, of Caronte, and of Berre.

One of the most difficult questions to decide on the subject we have in hand is that of the boundary of the sea at the mouth of streams and rivers. In this respect first should be consulted the decree of February 21, 1882, which indicates the conditions from which the limits of marine inscription are fixed, points where the salt water ceases, and the limits of the sea.

The first two points are fixed by the decrees of the president of the Republic, based on the propositions submitted by the minister of the navy. The limits of maritime inscription serve to indicate who are the marine navigators who form a part of the inscription and by this are attached to the military service of the fleet. The limits of salt water have for aim the fixing of the area of maritime fisheries. These two limits are independent and may be distinct.²

The limits of maritime inscription vary greatly according to streams and rivers.

¹ See the memorial of M. Aucoc mentioned above.

² See in this respect the four decrees of the 4th of July, 1853, for the marine districts of the English Channel and the ocean, and the decree of the 19th of November, 1859, for the district of the Mediterranean. A few later decrees have added modifications.

As a limit of salt water is taken the point where the influence of average full and new-moon high tide is felt.

The delimitation of the seashore is established by decree of the President of the Republic in the form of public administrative regulations, all rights of third person reserved, on the reports of the minister of the navy; if the sea touches the coast, and on the report of the minister of public works if the coast is indented by the mouth of a stream or a river. (Art. 2, decree of Feb. 21, 1852.) The ordinance of 1681, as it appears from its very wording, applies only to the first hypothesis.

In ascertaining the extreme limit in a river one may take into account the outline of the banks, the saltiness of the water, the vegetable growth on the shores, and the nature of the land. Can it be said that the sea reaches the point to which the highest tide of March drives back the waters of the stream or river? The majority of writers answer in the negative, notably Henrion de Pansey (*Dissertations féodales*, V. I, p. 6, Eaux, sec. 6) and that opinion has been affirmed by the parliament and the council of State. "Were it otherwise," says Merlin (*Questions de droit*; Shores of the sea), "the seashore would in certain places expand so as to be over 30 myriameters distant from the sea itself, an absurd proposition which was surely not contemplated by the ordinance of 1681."¹

Another system, which is wholly to the advantage of the shore owners, only pays attention to the outline of the shores. The limits of the sea stop at the point where the bluffs or beaches are broken by the river banks, and vice versa.² This system could be accepted only if it were shown that the break in the seashore was caused by the waters of the river and not by the waters of the sea, and, in examining that question, weight may be given to the volume of the waters of the river as compared with the volume of sea water. We therefore think it advisable to admit an intermediate system concerning the importance of facts and circumstances, the slope of the shores, the nature of the water and the shores, the volume of salt water in comparison with the fresh water; this is, however, a theory confirmed by a decree of the Council of State of March 6, 1882, relating to the bay of the Seine. The parties who won their case as to the delimitation of the coast were not able to carry their point as to the question of the delimitation of the sea and of the river. The principle is set forth in the above-mentioned decree as follows:

The maritime character of the bay of the Seine below the contested boundary is the combined result of the physical con-

¹ See the decree of the Court of Cassation of July 22, 1841, in the Maneville case, affecting lands lying at the mouth of the Seine. (Dalloz, 1841, 1, p. 325.)

² Dalloz, 1869, 1, 489.

figuration of the said bay and the nature of the waters therein found and of the alluvion formed.¹

The question of jurisdiction in matters of determining the boundaries of public domain has given rise to very interesting and active discussions between Messrs. Aucoc, Laferrière, Bathie, and Ducrocq.² The administration is competent to make this determination; it is a question of settling a matter of general interest, in fact, article 2 of the decree of February 21, 1882, has sanctioned this theory. The third parties have a right of appeal against these acts of determination; the jurisprudence of the Council of State did not formerly admit this right, except in cases where the determination was made in the past and not in the present,³ and the judicial authority not desiring to encroach on administrative territory, contented itself with intervening when need arose, to accord an indemnity to the dispossessed proprietors.⁴ But the Council of State has finally gradually consented to admit appeals against inexact boundaries. From 1873 the jurisprudence of court of appeals was fixed on this point (decision of January 11, 1873, case of Paris-Labrosse). It was even decided that proprietors unjustly dispossessed could have recourse to a court of claims before the Council of State or else recourse to judicial authority, which may recognize the property right and fix an indemnity, if the administration maintained its illegal determination.⁵ But if the changes in boundary are only a result of the natural movement of the waters, there is no ground for indemnity.

Section II, page 29.—Determination of the area on the high seas—Theories of ancient authors—Theories of modern authors—Systems sanctioned by conventional law—Conclusion.—Having examined the limits of the territorial waters from the coast, we must now consider how far it extends seaward. These are two distinct questions that authors have sometimes confounded. This extreme limit can be fixed at an invariable distance, or again can be modified according to the possibilities of the exercise of *imperium*.

Formerly ancient authors were all the more willing to extend the limits of the territorial waters, as they called them maritime territory, and wanted to protect them from the invasions of pirates and

¹ This opinion is sustained by M. Paul Chalvet, Laureat of the Académie de Toulouse, in his work entitled "*Législation des bords de la mer*" (No. 30); (*Revue de droit administratif*, year 1860); also the work of M. Plocque, *De la mer, et de la navigation maritime* No. 169; M. Fournier, commissaire of the navy, has a different opinion; he deals exclusively with the nature and volume of water. (*Revue maritime et coloniale* of 1878, vol. lvii, p. 579.)

² *Revue critique de législation et de jurisprudence*, 1868, 1st part, p. 385; 1869, 1st part, p. 121, 353, and 433; 2d part, p. 105 and 297; 1875, p. 275 and 353.

³ Judgment of the Council of State of Apr. 4, 1845 (Barsalou case) and of the 31st of March, 1847 (Saubron case).

⁴ Decree of the court of cassation, May 20, 1849 (Combalot case); May 20, 1862 (State v. Perrachow); May 14, 1865 (Aurousseau case).

⁵ Decree of court of claims (May 27, 1876) relative to the district of Sandouville.

belligerent States, especially as the seas were infested with pirates, and the principle of the rights of the people was not strictly enforced by the European States.

According to Baldus, following the opinion of the fourteenth century, the extent of territorial waters was 60 miles, and Bodin¹ in the sixteenth century confirmed the same theory. Sarpi tells us that we must take as a standard "the needs of one city without doing injury to those others," but then this would vary with each city. According to Cæpolla² the distance is a hundred miles; we find it so defined in the charter granted by the King Don Jacques of Aragon to the city of Cagliari in Sardinia. Loccenius³ determines the extent of territorial waters at a two days' trip, but this is an entirely arbitrary measure, depending on the speed of the vessels and the force of the wind, and having no juridical basis. The same reason must make us reject the system dealing with the range of the human voice uttered on the coast.

According to some,⁴ the territorial waters consist of all waters extending within our sight, but then this uncertain limit will vary, according to whether the sea is observed from a flat coast or from the top of a cliff, and will depend on the sight of the observer; it is, moreover, in these terms that Bynkershoek⁵ criticizes an ordinance of Philip II, King of Spain, who sanctions the theory:

Verum et nimis laxum est vagumque, vel utique non satis certum; an enim qui longissime patet prospectus idque ex quâlibet terrâ? littore? arce? urbe? an quo quis nudis oculis prospicit? an quo quis cernit acutus? Sanc non quo acutissimi; apud veteres enim memorantur qui ex Siciliâ Carthaginem viderunt. Fluctuant ergo etiam hæc in incerto.

According to the others the depth of the waters must be taken into account; that is Valin's⁶ system, who claims that the waters are territorial as long as they can be sounded. This opinion deserves the same criticism as the preceding one. On certain coasts the power of the State will be too extended, while on others it will be restricted; there will be in this case cause for a great deal of arbitrariness and the limit will vary according to whether the coast is more or less elevated. Valin had himself seen the imperfection of his system; so he indicates the range of cannon for lawful limits if the coast is too precipitous and limits to two leagues the coast guard vessels' right of visitation in rather shallow marginal seas, but in the matter of fisheries the principle remained applicable. These different modifications

¹ Bodin, *De re publica*, lib. 1, cap. x.

² Cæpolla, *De servitutibus prædiorum urbanorum*, cap. xxxvi, no. 14.

³ Loccenius, *De jure maritimo*, lib. 1, cap. iv, no. 6.

⁴ Mr. de Rayneval has upheld this theory of the true horizon in the *Inst. du droit de la nature et des gens*, liv. ii, chap. ix, sec. 10.

⁵ Bynkershoek, *De dominio maris dissertatio*, cap. ii.

⁶ Valin, *Commentaire sur l'ordonnance de la marine de 1681*, liv. v, tit. 1, vol. ii, p. 687.

do not do away with all the inconveniences of Valin's theory, and the irregularity and uncertainty of the boundary line still remain.

Modern authors generally define the extent of the territorial waters to be the longest range of cannon, and this theory conforms fully with the nature of territorial waters: *terræ potestas finitur, ubi finitur armorum vis*. This opinion, upheld formerly by Valin, by Bynkershoek, and by Merlin,¹ is also defended by Hautefeuille,² de Cussy, Azuni, Lawrence,³ Gessner,⁴ Bluntschli,⁵ Field,⁶ Pradier-Fodéré, and Perels,⁷ Heffter, de Martens, and Klüber. . . .

Perels claims that the limit of the territorial waters is determined by the extreme line to which the protection of the waters from the coast extends. This extent is, therefore, measured by the range of cannons, but it is only a question of the possibility of the defense of the coast and not the reality of this defense. Mr. Martens⁸ says:

The preservation of the domain of the territorial waters by the coast State is not dependent on the establishing and maintenance of permanent works, such as batteries and forts; the sovereignty of the territorial waters is no more dependent on its mode of exercise than the sovereignty of the territory itself.

In order to show the power of the engines of war now employed it is necessary to mention the formidable cannons which constitute the armament of the coast, or even of vessels; their range increases in proportion to their dimensions. Thus the English vessel *Benbow* is armed with a monster cannon of 110 tons; its projectiles weigh about 816 kilograms and the charge contains 8 octagonal cartridges each weighing 56 kilograms 425, or in all 453 kilograms (1,000 English pounds). The cost of ammunition alone is estimated at 2,500 francs for each shot.

In France also they experimented with formidable cannons. but we need not deal with this technical question, which is out of our subject.

Vattel, after admitting that the territorial waters extend as far as the range of cannon, asserts later that it can be extended as far as the security of the State demands and as its power permits.⁹

Kent claims that the United States of America may develop their *imperium* on territorial waters outside of these limits, presenting as

¹ Merlin upheld two opinions at the same time; in his *Répertoire* under the word *mer* he fixes the extent of territorial waters at 2 leagues from the coast; under the word *occupation* he extends it to the range of cannon.

² Hautefeuille, *Droits et devoirs des nations neutres* (ed. 1848, vol. 1, p. 238).

³ Lawrence: Note on Wheaton, p. 846.

⁴ Gessner, *Droit des neutres*, préf., p. 28.

⁵ Bluntschli, *Droit international codifié*, art. 302.

⁶ Field, *Projet de Code international*, sec. 28.

⁷ Perels, *Droit maritime international*, translated by Arendt, p. 28.

⁸ De Martens, *Précis du droit des gens*, vol. 1, p. 144.

⁹ Vattel, 1, p. 29, and following.

an excuse the interests of the Treasury and considerations of national defense. According to the same author it would be necessary to draw a dividing line between each promontory, so that the part of the Gulf of Mexico included in the territorial waters would extend from the southern point of Florida to the mouth of the Mississippi, and would thus have an extent of 180 miles beyond the coasts.

Great Britain also exercises excessive pretensions over territorial waters in customs matters; her cruisers have supervision rights over a distance of 4 leagues—i. e., 12 miles off the coast, can arrest and inspect foreign vessels; and should fraud or contraband be found to exist the vessel at fault is tried by an English tribunal. For this reason Kent claims the same rights for the United States of America, and even goes so far as to claim that territorial waters should be declared neutral. In keeping with English law it is also required that ships coming from infected ports shall give a quarantine signal should another vessel be encountered within the prescribed 4 leagues, and a fine of 200 pounds sterling is imposed for failure to comply with this requirement; but foreign vessels can not be forced to submit to such a measure, which is contrary to the law of nations, and which may cause them injury.

The area of territorial waters may be uniformly fixed; such is the opinion of Mr. Seward, Secretary of State of the United States of America. In a note dated October 16, 1864,¹ he endeavors to bring about between the States an international agreement on the three following points:

1. Should the jurisdiction of the coast States be extended to a distance of 5 miles while the present area is of 3 miles?

2. In order to insure neutrality in territorial waters would it not be necessary to forbid the firing of batteries at a distance of less than 8 miles from the coast?

3. Would it not be preferable to replace the cannon-range distance by a uniform limit, stated in figures?

At first glance this theory seems practical and appears to eliminate the inconveniences of other systems, but after giving it a more careful study its defects are easily recognized. The range of a cannon has already much varied, and there is nothing to indicate that scientific progress shall not cause yet greater variations; so that the fixed distance determined upon by the States, which would necessarily remain unchanged, might be in disproportion to the range of new cannons, and we have admitted as a fundamental principle that it must be possible for territorial waters to be defended by the coast State military forces. However, the theory of Mr. Seward has the incontestable advantage of bringing about a common agreement,

¹ *Post*, p. 662.

which is realizable in certain matters, especially if the circumstances of fact and the rights of each State are taken into consideration.

From the above it is concluded that the area of territorial waters can not remain less than nor extend beyond the point where the coast State can no longer exercise its *imperium*, and this line of demarkation has justly been called the *line of respect*. It has been determined by cannon range because the cannon is the most powerful and efficacious arm in the enforcement of this *imperium*; and in fixing property right, or merely the right of sovereignty, both theories have quite or nearly the same result.

The area of territorial waters is not fixed at extreme cannon-range distance by authors only; this solution is also confirmed by various international treaties, notably—

The regulations of the Grand Duke of Tuscany (art. 1), August 1, 1778.

The edict of the Republic of Genoa, July 17[1], 1779 (art. 1).

The edict of the Republic of Venice, September 9, 1779.

The treaty of 1786 between France and England (art. 48).

The Russian privateering regulations (art. 2), December 31, 1787.

The treaty of 1787 (art. 28) between France and Russia.

The treaty of 1787 (art. 19) between the Two Sicilies and Russia.

The treaty of 1794 (art. 25) between the United States of America and Great Britain.

The treaty of 1795 between France and the regency of Tunis (art. 3).

The treaty of 1842 between Portugal and Great Britain (art. 3).

To this there are exceptions, such as the treaties of 1685 and 1767 between France and Morocco, forbidding Moorish ships to cruise at a distance of less than 30 miles from the shores of France.

In matters of customs there are also special rules. The area of territorial waters is usually of 4 or 5 leagues. It must also be noted that the most recent treaties fix at 3 miles the area of territorial waters, but these all relate to fishing industries.

Among the principal of these we will cite that of October 20, 1818 (art. 1), between the United States of America and Great Britain; that of August 2, 1839 (art. 9), between France and Great Britain; the international convention of May 6, 1882 (art. 2), signed by a great number of maritime States.

The law prohibiting fishing privileges to foreigners in the territorial waters of France and Algeria reserves this privilege for the natives for a distance of 3 miles.¹ The supreme court of Chile applies the same principles when it declares itself incompetent to punish

¹ That law was passed in the Senate on its first reading Nov. 17, 1885, and on its second reading Nov. 24, 1885. [The text of Article 1 of this *projet de loi* is identical with that of the law of March 1, 1888, printed *post*, p. 527.]

an offense committed at a distance of 7 or 9 miles beyond Chilian waters.¹

In treaties the generally admitted limit is of 3 miles, and by miles is understood nautical miles of 60 to the degree of the Equator, 4 of which are required for a nautical mile and 3 for a marine league. A marine league is therefore equivalent to 5,555 meters and a half, or 2.999 nautical miles. This limit of 3 miles is particularly recorded in fishery treaties and treaties of neutrality.

While most treaties adopt a limit of 3 miles, this is not a general or universal measure, and these treaties are intended especially for fishing privileges reserved to the natives. But from this special and legitimate restriction one must not conclude, like certain authors, that formerly the distance of cannon range coincided with this distance of 3 miles, and that this limit has actually become the fundamental rule of the law of nations in the determination of their territorial waters. We adopt the theories of Calvo,² more explicit than the English and American authors, who note the identity of these two terms without explanation or justification.³ Their error was originally sanctioned by the Territorial Waters Act of 1878.

If at a certain period cannon range did not exceed 3 miles, and if certain special treaties have sanctioned this measure, one must guard against generalization and conclude that such is invariably the case. The distinction is clearly made by Ortolan:⁴ "The longest cannon range is the ordinary limit, that set by the universal law of nations, which must be observed by all in the absence of any treaty.

"But nothing can prevent certain powers from fixing among themselves by means of treaties another area to territorial waters. However, the area thus fixed will be obligatory only for the contracting parties, the other powers observing the common rights." De Martens,⁵ Schiatarella,⁶ Gessner,⁷ Field,⁸ and Bluntschli⁹ also sustain the same theory.

The area of territorial waters can not be indefinitely extended; it would be contrary to the general interests of the States. We could do no better than to quote in this connection the following words of Mr. Hautefeuille (*Histoire*, p. 20):

There has been much discussion on the area of territorial waters; even to-day certain nations give to this interpretation

¹ *Journal du Droit International Privé*, by Clunet, 1875, p. 38. Concerning the area of territorial waters this same *Journal* may also be referred to, 1876, p. 413, and 1877, p. 164.

² Calvo, *Droit international théorique et pratique*, par. 244.

³ Wheaton, Vol. 1, p. 168 (4th edition), and Phillimore 1, par. 198.

⁴ Ortolan, *Diplomatie de la mer*, vol. 1, p. 159.

⁵ De Martens, I, p. 144 *et seq.* (2d edition).

⁶ Schiatarella, *Del territorio*.

⁷ Gessner, *Le droit des neutres sur mer*, p. 23.

⁸ Field, *Projet de Code International*, paragraph 28.

⁹ Bluntschli, *Droit international codifié*, art. 302.

of maritime liberty. The definition of territorial waters suffices to fix its area. Maritime waters become territorial only when they can be defended by the sovereign of the shore in a permanent and absolute manner; therefore only those that come under this rule acquire that quality. The actual extent of defensive power is the limit of territorial waters; most of the civilized people have accepted this limit; they regard as territorial all waters under range of a cannon placed on shore. All demands made by certain nations beyond this limit are illegitimate pretensions, which can not be justified.

From this we conclude that in default of special conventions, the real limit of territorial waters must be cannon range, and as the longer range of the best cannon is admitted, this distance would vary at different periods.

Calvo¹ pretends that this limit is of at least 5 miles, and that treaties should change the existing limit of 3 miles. Perels estimates it at about 8 miles (nautical), that is 14 kilometers, 816 meters.

In regard to gulfs and bays we will note that when the openings do not exceed double cannon range their waters are territorial. The authors, in accord on this point, argue to learn if the measure is indicated by the shore or else by a line drawn from headland to headland. This last system, it is generally admitted, seems contrary to the fundamental theory of territorial waters, for the *imperium* can not be exercised over all waters comprised in this limit, and it is wrong to pretend that the application of this principle carries no objection, since the fixed distance is 3 miles and not cannon range, and that this delimitation only concerns the bays whose openings do not exceed 10 miles.

Mr. Pappafava² admits that to fix the limit of the marginal sea in a more regular manner a fictitious line might be drawn from headland to headland, but he applies this solution only to coves or small bays and not to gulfs of extended area. Let us add that Mr. Antoine, his translator, rejects this final restriction, which after all has no serious foundation. . . .

Chapter III, section II, page 48—Mouths of rivers.—Mouths of rivers are assimilated to inland waters and are comprised in territorial waters. We will even add that the islands situated before these mouths are supposed to form a part of the territory itself, so that the territorial waters begin only from their coast; this is for the reason that the elements which form these islands by alluvion have become detached from the mainland. This opinion has further been confirmed judicially in the United States following a capture at the mouth of the Mississippi.

¹ Calvo, *Dictionnaire de droit international public et privé* under *Mers territoriales*.

² *Journal du droit international privé*, 1887, pp. 441-448 and 570-575. See article published by Mr. Pappafava; *De la mer territoriale et de la soumission des navires étrangers à la juridiction locale*.

The same theory must be admitted for the same reasons for islands situate on the shores, even though they are not in proximity to the mouths of rivers.

While islands that find their birth on the high seas become the property of the discoverer, those which form in territorial waters belong to the coast States, as is required for the safety of the mainland; this is the theory that is laid down by Heineccius and Bluntschli. Let us add that authors generally discard this question, which appears to them without doubt of small importance.

Section III, page 48—Gulfs and large bays.—What must be decided in regard to bays and gulfs? Shall we accept the theory of Ortolan, who assimilates them to ports and roadsteads: "When these indentations formed by the land of the same State do not exceed in width double cannon range, or when the opening can be protected by artillery, or when it is naturally protected by islands, by sand banks, or by rocks?" To this question we must reply negatively; it is true that these gulfs or bays are under the control of the coast State; but there can be no question here of a real property right, and the constant progress of the ballistics would bring too great a restriction on the liberties of the seas. We will therefore apply the rules of territorial waters, and we will recognize for the coast State a right of *imperium* and not a right of *dominium*. At any rate the civil code furnishes an argument *a contrario*, since in the category of things constituting public domain there is no mention made of gulfs or bays.

In regard to bays whose width exceeds 10 miles, it is wrong to suppose that a right of sovereignty is exercised over them; at any rate such claims have not been acceded to by foreign States; or, if so, it was done under compulsion and not permanently. England and its writers claim such a right—not only on the Bristol Channel, the St. Georges Channel, St. Patricks Channel, and the Irish Sea, but also on the waters comprised within the area of a line drawn from headland to headland; these are the Royal Chambers or Kings Chambers.

The United States have made similar claims on the large bays of North America; therefore, according to Kent, its sovereignty should extend from the Gulf of Mexico to the southern point of the Florida coast to the mouth of the Mississippi. The Gulf of Mexico and Hudson Bay, as well as the Bay of Biscay and the Kings Chambers, can not be territorial waters; and England was in the wrong when it considered, in an ordinance of 1872, as English territorial waters Conception Bay in Newfoundland, which has an area of 40 miles by 15. Wheaton admits, however, jurisdictional power of England over these waters, and Twiss claims that in these zones there can be no fighting in time of war. But the authorities, actuated by broader

views, now deny this right of sovereignty, while admitting that the coast States can exercise to a certain extent the attributes of a maritime police. In this manner the Territorial Waters Act of 1878 limits to 3 miles the extent of English jurisdiction on territorial waters.

Austria-Hungary can not claim sovereignty of the Bay of Klek, for a part of the coast belongs to Turkish territory; but the Gulfs of Finland and of Riga, the Zuyder Zee, and the sea that separates the Isle of Wight from Great Britain may be considered as territorial waters. Formerly the Gulf of Bothnia was considered the property of Sweden;¹ to-day, Finland having been ceded to Russia by the treaty of Friederichsham (5/17 September, 1809), it should belong jointly to Sweden and Russia. This solution, proposed by Heffter, must be rejected and declared inadmissible, for it is contrary to the principles of international law. The Gulf of Bothnia is part of an open sea.

An effort to prevent hostilities in these waters and guarantee more effectively the safety of the coasts is not sufficient to extend in this arbitrary and excessive manner the rights of coast States over marginal seas. As a matter of fact, practice is confirming the solution which we are proposing. Accordingly article 9 of the Franco-English convention of August 2, 1839, regulating fisheries in the English Channel, grants to the coast State exclusive fishing rights in bays whose openings do not exceed 10 miles, counting from the extreme points of the mainland and sand banks. Also a notice of November, 1868, from the British Board of Trade accepting the fishing limits fixed by the Confederation of North Germany for the German coasts, grants to German fishermen exclusive fishing rights in bays or coast indentations having a width of 10 miles or more, counting from the extreme points of the mainland and sand banks. It must not be concluded that the State has exclusive rights over these waters, but that it alone can exercise fishing rights and reserve them for its nationals; furthermore, these are protected in the exercise of this right by the navy against encroachment by foreign fishermen, and maritime police is in this way easily enforced in territorial waters.

Let us also note a recent international convention concluded May 6, 1882, at The Hague, and regulating fisheries in the North Sea outside the jurisdiction of territorial waters. Article 3 is worded as follows:

For bays the zone of three miles shall be measured from a straight line drawn across the bay, in the part nearest the opening, to the first point where the opening shall not exceed ten miles.

¹ Heffter, *Droit international de l'Europe*, paragraph 75, 4th edition.

From article 2 it appears that the limit of 3 miles is counted from low-water mark.

Finally the French law of May 1, 1888, reserving for the benefit of the natives fishing rights in territorial waters, declares that bays with reserved fishing rights are those whose openings do not exceed 10 miles.

It is proper to add that all these regulations relate particularly to fishing rights; but this is the result of the fact that the fishing industry is of considerable utility, since it develops the commerce and industries of the States, while furnishing a means of subsistence to the people living on the coasts; and it may be stated in a general way that the coast State can exercise in these gulfs and bays the rights which are accorded to it in territorial waters.

Part II, chapter I, page 119—Coast fisheries.—We saw in the first part of this essay that coast States exercise over their territorial waters a sovereignty from which they derive numerous and important rights; they may regulate and even reserve for their nationals coasting trade and fisheries, exercise a right of police and jurisdiction, establish maritime forms of ceremony. . . . It is now fitting to take up in detail all these rights ascertain the grounds which justify them, and then establish their system of regulation. Beginning with the most important we will first consider the coast fisheries, next the coastwise trade, policing rights, and forms of maritime ceremonial; lastly, in a concluding chapter, we shall consider the special and important right of jurisdiction.

Section I, page 120.—Foundation for and justification of the right to reserve fishery rights for the nationals of the coast States in territorial waters.—While international intercourse has remarkably grown during the century it must be admitted that fishery questions have notably been made the subject of new and justified regulations¹ designed to have the best effects.² The physical aspect of the question has also engrossed the attention of States. We may in this connection mention the exposition of fishing devices and implements at London in 1883, the exposition of Nice in 1884, where a special section was set apart for the fisheries, and lastly the maritime and export exposition held at Havre from May 7 to October 15, 1887.

At the congress of Paris the fishery question was incidentally considered. We find in the declaration of that congress of April 16, 1856, that if a State not represented at the congress should be unwilling to accede to the declaration it would be desirable that the powers represented at the congress embody in special treaties con-

¹ *De la pêche en droit romain et dans le droit international actuel*, by Mr. J. Imbart Latour (thesis for doctorate) Paris, 1885.

² In the *Annuaire de l'Institut de droit international* (vol. ix) mention is made under date of Feb. 2, 1887, of a meeting at London for the purpose of regulating sea fisheries.

cluded between that State and the signatories to the declaration, as immutable principles forming part of the treaty, provisions concerning, for instance, the limits of the territorial sea and the respect to which they are entitled, the sea fisheries, the respect of private property at sea in time of peace or war in accordance with the practice on land.

The fisherman's trade is one of unquestionable usefulness and publicists have never failed to point out this fact. "Without it," says Lacépède, "no nation can have a reliable shipping, or thriving trade or maritime strength, and, as a consequence either wealth."¹ Water is generally inhabited by fish which can not be counted and that are wonderfully prolific; they supply mankind with an abundance of food. Not only does fishing procure employment for thousands of beings, it is the source of a considerable trade profitable to the State and its nationals; it offers the further advantage of training seafarers and preparing them to become valorous and formidable fighters.

These are the considerations which were urged by the minister of marine, M. Ducos, in his report on the decree law of January 9, 1852:

The prosperity of coast fisheries is all the more important in our days for the people's food, as the railways make it possible for their products to reach the centers of consumption to which the old means of transportation could not bring them quickly enough. On the other hand, that industry affords to the people who live along the shore their main occupation, and it proves a weighty factor in the recruiting of our seamen.

So the coast State has the right to reserve for its nationals the territorial water fisheries, and it is its duty to secure for them this privilege based on natural, political, and economical considerations. The authorities of ancient and modern times are practically unanimous in recognizing that right which was always conceded to the coast States, but has given rise to well-founded claims when, as it has sometimes been, carried too far. For instance, Eric, King of Denmark and Norway, declared, in 1432, to the King of England, that trading and fishing had never been open to aliens in Norwegian waters without a special license. But the British subjects subsequently obtained that privilege by means of treaties, of which some were enforced and others were declared void. The question was about the sea adjoining Iceland, in which whaling was very profitable. In the seventeenth century this dominion of the Kings of Denmark was again established by additional treaties.

Section II, page 123.—Coast fisheries—Special regulations—Transportation, importation, and exportation of fish.—The study of coast

¹ Lacépède, *Discours sur la nature des poissons*.

fisheries is closely connected with the subject of territorial seas; it seems that no distinction can be made between coast and territorial water fisheries, but this is not quite true as coast fishing vessels do not always remain close to the coast and may go to cast their nets into the open sea, where they can no longer exercise the privilege of their nationality. The conclusion must be that the distinction between inshore and deep-sea fisheries can not in every respect be the same as that which is made between deep-sea and territorial water fisheries.

Coast fishery, as suggested by the name, is practiced along the coast or at least a short distance therefrom. It is free, not subject to farming or license, within the limits set by the "Inscription Maritime" and in the rivers, streams, and channels, to the point where salt water stops.¹ If we take into account the fact that territorial waters are reserved for coast fisheries and for the nationals of the coast State, we may conclude that in principle fishing in territorial waters may be identified with coast fishery and we shall so term it.

Coast fisheries were formerly governed by numerous local regulations whose details were minute and penalties poorly enforced. The fundamental law in the matter is an organic law of January 9, 1852; coast fisheries are reserved for nationals; the maritime prefects are charged with the supervision of fishery standing establishments erected on our coasts and with the detection of forbidden implements.

The law decree of January 9 and that of March 19, 1852, require that reports of offenses (*procès verbaux*) shall be affirmed within three days, but do not say that the date of affirmation shall be stated in the report nor that that instrument must be signed by the officer who drew it up. Yet these formalities must necessarily be fulfilled, according to a circular dated January 15, 1884, of the Minister of Marine and Colonies.

Offenses are entered on record by the commissioners of the *Inscription Maritime*, the syndics of seafaring men, the maritime guards, and gendarmes.

The jurisdiction and special penalties provided by the decree of March 24, 1852, for the seamen of the French merchant marine do not affect foreign sailors, so offenses committed by foreign seamen come under the penal code and are referred to the jurisdiction of police courts. This is the solution established by the *Correctionnelle* Chamber of the Court of Algiers on May 22, 1836, in the case of the Greek smack *Evangeliste*, which had been fishing sponges on the Tunis coast, and article 311 of the Penal Code was applied. This theory seems to conflict with article 3 of the Code Civil, which makes police and safety laws applicable to foreigners in France, and thereby

¹ Block, *Dictionnaire de l'administration française*, vol. iv of the annual Supplement (November, 1881). Law of Dec. 15, 1880.

apparently subjects them to the said laws under the same conditions as the nationals. But it is positively stated in article 3 of the decree of March 24, 1852, that the provisions of the decree are applicable to French vessels and boats only, and it may be inferred therefrom that the commercial maritime tribunals can only take cognizance of maritime offenses committed by the seamen of French boats.

The decree of January 9, 1852, was greatly amended by that of May 10, 1862, by which forbidden implements are specified, oyster dredging regulated, and certain rights conferred upon maritime prefects. Let us call attention to the general regulation of November 7, 1866, concerning sea fisheries (art. 298 *et seq.*):¹

Within the 3-mile limit from the low-water mark the decree of 1862 is applied; beyond that limit there is no other regulation than those which are derived from international conventions; yet certain kinds of fishing may be temporarily prohibited on the request of the fishermen or their representatives. The Anglo-French convention of 1839 prohibits the dredging of oysters between sunset and sunrise; fishermen in the Channel may land their implements and then export their catch to England without being held to register in the coasting trade, but in that case the crew list must bear a special visé.

Admission to the coasting trade does not necessarily include admission to coast fishery; a special license is required, reciprocal advantages of this nature are often granted by treaties, and as far back as the fifteenth century there was such a treaty concluded at London in 1459 by Henry VII of England with Archduke Philip of Austria, Count of Holland and Zeeland.

The same is true of the sale of fish; while foreign fishermen may fish within the territorial waters of another State, it does not follow that they may sell their fish in a port of that State which they enter. Old treaties granted to the Catalans the right to fish on the coasts of France and to sell their fish at the port where they enter. The law of December 8-12, 1790, continues this privilege, places them under the jurisdiction of *prud'hommes*, requires them to have a crew list and to pay dues styled "half-share" when they sell their fish in a French market. Catalans domiciled at Marseilles also have the right to spread their nets on the commons, to attend the meetings, to vote for and even to be elected to "prud'hommes."

While the French-Spanish convention of 1859 did not make any change on this point, it may be said that article 9 of the commercial convention of December 8, 1877, and article 29 of the treaty of commerce and navigation of February 6, 1882,² have abolished these privileges. . . .

¹ *Journal du droit international privé*, 1886, p. 718.

² De Clercq, *Recueil des traités de la France*, vol. xli, p. 48.

Section III, page 133.—Limits of coast fisheries (International Convention).—The question of fisheries in territorial waters was indirectly solved by the international convention of The Hague of May 6, 1882, to which Germany, Belgium, Denmark, Prussia, Great Britain, and the Netherlands are parties. The question about regulating the fishery police in the North Sea, outside of the territorial waters, and on that very ground it was necessary to establish a dividing line between the said waters and the open sea. The main advantage of those international conventions, which can not be strictly alike, in that they are governed by one and the same rule.

Article 2 of the convention provides that "national fishermen shall enjoy the exclusive right to fish within a radius of 3 miles from the low-water mark along the whole expanse of coast of their respective countries as well as of the islands and shoals appertaining thereto."

The mile, which is the measure used by sea-faring men, was preferred to the kilometer, and article 3 accurately defines the length of that measure:

The miles referred to in the foregoing article are geographic miles of 60 to the degree of latitude. In the cases of bays the radius of three miles shall be measured from a straight line drawn across the bay, in the part nearest to the entrance, to the first point where the opening does not exceed ten miles.

Article 2, so says the convention, in no wise affects the right of free circulation granted to fishing boats soiling or anchoring within territorial waters, provided they shall comply with the special police regulations issued by the coast powers. In this wise was the wording accepted as proposed by the French delegates who did not wish to bring into play the Anglo-French convention of November 11, 1867, which took into account the interests of the oyster beds that are not found in the North Sea. In compliance with objections made by the German delegates in connection with the mouth of the Elbe, which is an exclusively German body of water, and by the French delegates, the final restriction which maintains the rights of the States was added to article 2.

The 3-mile limit is generally admitted and seems to afford a sufficient guaranty of the rights of the population of the shore; the extent to which these interests must be protected provides the only justification of the rule excluding foreigners, and we must not draw from it the conclusion that the exercise of the other rights of a State within territorial waters must be confined within the same limits. In any event that is the proposition that was sanctioned by the law inhibiting foreigners from taking fish in the territorial waters of France and Algiers. In the definition of the 3-mile limit the following phrase is purposely used: "In the reserved part of the French territorial waters."

Objection has been made to the enforcement of The Hague convention and the subsequent law of 1884. It was claimed that the protocol of that convention was never published in France and that the law of 1884 required the enactment of penalties by the other powers. We must not forget to add that this position, affirmed by a judgment of the Court of Boulogne-sur-Mer, dated February 25, 1885, has been denied¹ by the Court of Douai (decree of April 28, 1875) and by the Court of Cassation (decree of November 5, 1885).

Section IV, page 135. Foreign legislation.—The fishery right may be reserved for nations in two different ways—by a municipal law or by a treaty. There are advantages and objectionable features in both systems. A law has a wider effect than a treaty which only binds the contracting parties; it can be easily amended, if defective, since it is a unilateral instrument, while the change can be made in a treaty without the consent of the signatory States. But the advantage offered by conventions is that they are more uniform, since they apply to several States, and that they avoid difficulties, that being their main object.

We shall have to consider in succession the municipal laws of the leading maritime countries and the treaties that have been concluded among them.

The German Penal Code (art. 216a) imposes a fine of 600 marks or imprisonment for not more than six months on aliens who take fish without license in territorial waters, and the judgment may direct the confiscation of the fishing tackle and catch found on board, whether or not they belong to the offender. This provision, which amends the Penal Code, springs from the law of February 20, 1876,² urged by the German coast fishermen who complained against the competition of English boats; and the German Navy protects its nationals and wards off the encroachments of English and Dutch fishermen. A notice issued in November, 1868, by the British Board of Trade acquiesced in the fishery limits set by the North German Confederation for the German coasts, and so German fishermen enjoy exclusive fishery rights in the bays and indentations not more than 10 miles wide counted from the nearest mainland and sand banks.

England excludes aliens, and specifically the Dutch, from herring fisheries at a distance of 10 leagues.

We may add that by article 7 of the English act of 1883 foreign boats are not permitted to cross the line of reserved fishing grounds unless for some purpose recognized by international law or treaties or for some lawful cause, and they must retire as soon as the purpose for which they did cross has been accomplished. In case of a breach

¹ *Revue internationale de droit maritime*, 1885–86, p. 353, Sirey, 1887, 1. 233. (See M. Chavegrin's note.)

² *Annuaire de législation étrangère*, 1877, p. 152.

of the said inhibition, the skipper or person ultimately responsible for the boat is liable on summary proceedings to a fine of not more than £10 for the first offense and £20 for further offenses.

In America aliens can neither take fish nor sail in certain parts of the sea,¹ and truly arbitrary limits are set in this respect by treaties. (Treaties between Great Britain and Spain of 1670, art. 15, and of 1790, art. 4.)

Under a ukase of Alexander I, Emperor of Russia, dated September 4–16, 1821,² the whole expanse of sea from Bering Strait to the fifty-first degree of north latitude, at a distance of 100 English miles from the Asiatic and American continents, was to be considered as a Russian sea and on that very ground foreign vessels could not take fish therein, under penalty of confiscation. But England and the United States of America protested and succeeded in securing a modification of the ukase and, on referring to the rules now observed by Russia as to captures and recaptures (art. 21), we find that the territorial sea does not extend beyond the range of the coast batteries.

The Danish ordinances of April 16, 1636, April 25 and May 30, 1691, May 3, 1723, and April 1, 1776, reserve for the nationals exclusive fishery and trading rights along the coasts of Iceland, the Faroe group, and Greenland. While the other States have not disputed this right to Denmark, Holland and England have always contended that they could take dogfish and whales outside the territorial waters.

In 1698 Denmark caused the seizure and condemnation of a Dutch vessel charged with fishing outside the said limits and to have conducted an unlawful trade with the people of the Faroe Islands. The case gave rise to difficulties, and other disputes of the same description followed. In 1740 a Danish ship captured Dutch vessels cruising along the coasts of Iceland; the Dutch Government, through the minister of the United Provinces at Copenhagen, alleged the existence of ancient treaties and privileges; the King of Denmark replied that the vessels were found within the reserved limit of territorial waters, and that under the principles of State independence and sovereignty, the sovereign must hold the right to exclude aliens from his marginal seas. As the upshot of negotiations as protracted as they were useless, the Dutch States General fitted out, in 1751, two war vessels charged with the protection of commerce, and, in answer to that measure, the King of Denmark sent a memorandum by which he reserved to himself the right to take

¹ Moser, *Versuch*, vol. v, p. 497, and *Nord America*, vol. II, pp. 401 and 533, and vol. III, p. 350.

² De Martens, *Traité de droit international*, translated by Léo, 1883, vol. I, p. 500.

such steps as his independence would require. The captured Dutch vessels and their cargoes were finally sold for the benefit of Denmark.

In 1776 similar occurrences raised difficulties between Great Britain and the United Provinces of the Netherlands. In accordance with the ordinances of March 25, 1751, and of April 22, 1758, an ordinance dated March 18, 1776, granted to a company the exclusive right of navigation and trade with Greenland, and extended that privilege so as to include Danish ports and colonies comprised between the sixtieth and seventy-third degrees of north latitude, under penalty of seizure and condemnation of the offending vessel for the benefit of the privileged company. The same year a Danish frigate captured near the sixty-ninth degree the English brigantine *Windsor* that had come to fish whales in those waters. The cargo was also seized, but on the protest of the British minister resident at Copenhagen the vessel, though condemned, was permitted to resume its voyage.

On June 20, 1776, two Dutch vessels, the *Middelhoven* and the *Rust-van-het-Vaterland*, sent to Davis Strait to fish whale, were captured and subsequently condemned, but they were restored to the owners while insisting that the sentence was lawful, and in this case, as in the foregoing, no indemnity was allowed the master on account of their detention by reason of the capture of the vessels. Count Bernstorff, Danish minister of foreign affairs, declared on that occasion that if the Dutch were most respectful of the regulations all these difficulties would be avoided and the two countries would live in unbroken harmony, which would fully meet the invariable wishes of the King of Denmark.

In our day Denmark would prohibit navigation and fishing 4 leagues from Iceland and 15 leagues from Greenland, but the foreign countries, notably Holland, resist that claim. The penalty provided by the pending bill is a fine of from 10 to 400 "crowns," and under the former law of March 7, 1788, still in force, fishing within territorial waters is denied to aliens or foreign companies; they can not hold any interest whatever therein unless they have their residence in Denmark or Iceland.¹

In Sweden and Norway fishing is absolutely prohibited to aliens.

In Italy aliens must pay a license fee of 30 livres in order to exercise fishery rights within territorial waters. (Decree of January 7, 1869.) . . .

Page 141.—Certain States, such as Russia, Germany, and Denmark, have advanced claims to an absolute right of sovereignty as regards fisheries, customs, and jurisdiction, and even in France it has been

¹ *Journal du droit international privé*, p. 39. We are unable to find in our laws any such positive provision concerning aliens' admission into or exclusion from fishing companies. But by article 14 of the decree of June 11, 1806, the use of foreign boats for fishing purposes or by fishing companies is prohibited.

said that while aliens were permitted to take fish in our territorial waters, it was not on the strength of any principle of international law, but from the effects of old standing usage growing out of a historical fact; the "family compact" first placed the Spaniards and the French on the same footing as to the exercise of fishery rights in their respective waters, and this condition originally extended to the people of the Two Sicilies, and next to the other citizens of Italy, was imparted to the inhabitants of the coasts of the channel and of the Atlantic Ocean. The "family compact" and the law of 1790 are abrogated and have been superseded by other conventions.

The exclusion of foreign fishermen has been urged by French fishermen on the ground that their outfit was better and cheaper, that they did not come under the "Inscription Maritime," and that their competition would ultimately drive out our fellow citizens from the fishing industry, to the detriment of the interests of the country. The commissions of 1849 and 1863 declined to act favorably on that petition, and alleged that the number of said foreigners was but one-fifth of that of the country's fishermen, that it was constantly decreasing, that they possessed a gift of order and thrift that was unknown to the French fishermen, and that instead of decreasing the high cost of fish would rise in proportion as the range of sale widened and the means of communications became easier. These various considerations should not have overshadowed the facts that regrettable animosities spring from thus bringing French and foreign fishermen together, and that it is to the interest of the nation that our fishermen be protected, since the institution of the "Inscription Maritime" destines them for the navy.

Certain States reserve the right of fishing in territorial waters for their nationals; that is the decision arrived at by France, Spain, and Great Britain. In other countries, such as Belgium,¹ Sweden, Norway, and Portugal, conventions may be referred to which merely favor fishermen of the country by means of customs duties and other advantages without excluding the alien. A third system, adopted by the Netherlands, Greece, Portugal, and the United States, sanctions the freedom of the fishing industry, but in these cases the cause generally lies in the very light interest offered by the fisheries or in purely local and special conditions.

Article 1 of the law of 1888 contains the fundamental principle which inhibits foreigners from fishing in territorial waters; and so, no matter what the system may be admitting aliens to share in the rights of the French, the right to take fish must be denied them. The pro

¹ The Belgian Government does base on its right of sovereignty a claim to exclude aliens, but the claim is not upheld by any provision of law. Serious disturbances took place at Ostend in 1887, when English fishermen imported, landed, and sold fish in that port.

hibition is general and applies to the dredging of oysters and shell-fish as well as to the taking of fish and coral, as indicated by the general meaning of the word fishery:

Fishing is forbidden to foreign boats in the territorial waters of France and Algiers within a limit set at three nautical miles from low-water mark.

In the case of bays the radius of three miles is measured from a straight line drawn across the bay in the part nearest the entrance, at the first point where the opening does not exceed ten miles. In the several maritime districts the line from which the limit is reckoned is established by decree.¹

Section II, page 306—Jurisdiction in the territorial sea.—The coast State exercises the right of jurisdiction over its marine territory; that is to say, over its harbors and roadsteads. We have noticed the exception made in favor of foreign warships and the restrictions relating to merchant vessels. We must now deal with this jurisdiction within the limit of the territorial sea and begin by recalling the principles which will serve as a basis in this matter. The territorial sea cannot be assimilated to the territory, and the State can exercise therein only those rights pertaining to the defense and security of its coasts, to the protection of its commercial and fiscal interests and of the interests of the inhabitants of the shore. But the exercise of those rights requires and guarantees to the State the jurisdiction which is necessary to assert them in an efficacious manner, and the legislative, executive, and judicial powers are limited in this respect to the same extent; so the jurisdiction will be applied only to the deeds committed in violation of the rights of the coast State.

In regard to warships, the solution above established about them *a fortiori* applies, since the coast State has rights of less importance in the territorial waters than in the harbors and roadsteads. These vessels are therefore exempt from local jurisdiction.

It is only in regard to merchant vessels that a right of jurisdiction can be admitted and exercised, and in certain cases they are even subject to the territorial sovereignty of the State to which they belong. Thus in regard to deeds committed on board and of no consequence to outsiders the coast State can not intervene, since its authority has not been violated, and the exercise of its jurisdiction would constitute in this matter a violation of the territorial sovereignty of the nation to which the vessel belongs. But according to certain authors,² the deeds, being of consequence to outsiders—that is to say, deeds committed in some way by the vessel herself—must

¹ See decree of July 9 and 13, 1888. The charts of the French hydrographic office and others on the same scale were used in fixing the line.

² *De la condition des navires dans les rapports internationaux*, by M. Telssier. (Thesis for doctorate, Paris, 1886.)

be subject to local jurisdiction, for the exact spot where they were committed is known, and besides they may infringe upon the territorial sovereignty of the coast State.

It seems that these circumstances are not in themselves of such importance nor of such certainty as to exercise any influence from the standpoint of jurisdiction. However, it is the generally admitted theory, and the distinction suggested in the opinion of the Council of State of 1806 is applied, besides, very often the deeds affecting outsiders also result in violating the rights of the State in territorial waters, and the two systems are closely connected; in both the question is to maintain order and to assign to each sovereign such authority as is necessary to maintain and exercise his rights.

In 1885 Mr. Henry¹ published a very complete and interesting essay on the jurisdiction and procedure of the admiralty courts of the United States. According to this author the territorial jurisdiction of a nation over the coast waters can not apply to vessels which do not hail from any port of that nation, and only make use of the free route of the ocean. Just because a vessel sails along the coast of a State, it is not necessarily amenable to the laws of that State; while a right of jurisdiction is exercised or claimed in territorial waters, this, according to Lord Chief Justice Cockburn, constitutes but the restriction of former claims to the dominion of *mare clausum*, which have, however, been completely ignored. According to him the jurisdiction over the 3-mile zone exists only for the protection and defense of the coast and its inhabitants.

Some authors even go so far as to admit that if, against the will of the master or owner and in spite of the efforts of the captain or the crew, the vessel has passed into territorial waters, or even into a port, it remains under the exclusive jurisdiction of its own Government. It so appears in a letter from Mr. Webster to Lord Ashburton, quoted by Wheaton in his Digest of International Law. The case was that of the American vessel *Creole*, taken into the port of Nassau by persons detained as slaves on the *Virginia*; but this incident being generalized, it was inferred that all vessels which are obliged to pass into the territorial zone remain subject to their national law. This claim is erroneous. As a matter of fact, through international relations and by tacit agreement the States undertake not to encroach in any way upon the local sovereignty of the nation in whose waters their vessels happen to be.

Can a neutral power forbid belligerents to fire guns in its territorial waters? The question was asked by Mr. Henry after an hypothetical fight between Great Britain and Russia in American

¹ *Jurisdiction and procedure of the admiralty courts of the United States in civil causes (on the instance side)*, by Morton P. Henry. (Philadelphia, 1885.)

waters. Even apart from belligerents, is it possible in times of peace to forbid foreign vessels to fire dangerous projectiles? Is it right for vessels to engage in target practice on the coast of a friendly nation?¹ Is it true that this can not be forbidden because of the fallacious pretense that these vessels are more than 3 miles distant from the coast? No; surely the distance of territorial waters was originally fixed at 3 miles because such was then the range of cannons, so that to-day it can be extended in proportion to the new range of its cannons.

The coast State is generally accorded the right to judge all offenses resulting from the discharge of firearms from a vessel, if said firing produces its effect on the coast.

The firing of projectiles is not the only act which constitutes an offense, this also applies to collisions occasioned by carelessness or criminal intention, and transshipment of foreign merchandise within the zone of 4 miles from the coast, such is the law of the United States and of Great Britain, and vessels carrying on an illegal commerce may be seized within the distance of 3 miles from the coast. (Church v. Hubbart, 2 Cranch, 187.)

One has the right to forbid these unlawful acts, even if there is no special provision governing the relations of the two States concerned; Phillimore, less audacious in his allegations, demands a special convention, some provision of this kind affirmed by the States. Defense against the aggression of belligerents of other States is not all, it is necessary to prevent their interfering with international commerce; this is a law of commercial conflict which though bloodless may bring about regrettable disasters. One can not leave unpunished such deeds as are not included in the offenses foreseen by federal councils or as international law, but which affect the existence and sovereignty of the State, and this alone fully justifies its intervention and full exercise of its jurisdiction.

Let us now consider a collision which gave rise to numerous juridical questions, caused by the passing of a new bill, and was recorded in the historic annals of international law.²

In February, 1876, the German vessel *Franconia*, sailing on the channel less than a marine league from Dover, collided with the English vessel *Strathclyde*, and this accident caused the death of a passenger on the latter. The *Franconia* entered the port of Dover; the captain being then subject to the jurisdiction of the English criminal court was arrested and accused of homicide due to carelessness, then brought before the central criminal court. The jury

¹ Francis Wheaton (*Albany Law Journal*, Apr. 8, 1885) refers to a similar case which happened on the coast of the United States of America. See *Journal du droit international privé*, 1886, p. 72.

² *Journal du droit international privé*, 1877, p. 161 et seq.

convicted the captain, but the latter challenged the jurisdiction of the court and the judge suspended sentence until the court for the consideration of crown cases reserved had passed upon the case.

The court accepted the challenge. The question to settle was two-fold: Was the offense committed on the foreign vessel subject to English jurisdiction? That was the point at issue. It was necessary, besides, to consider the facts themselves, and to determine whether the homicide had been committed on board the English vessel; the investigation showed that the captain of the *Franconia* had merely acted carelessly, without evil intention, and that he had not left the deck of his vessel: the conclusion was then forced that the act had been committed on a foreign vessel, and the second question was thereby solved.

Standing on the principle of the freedom of navigation, and admitting that all merchant vessels are subject to the laws of their flag, while recognizing that each State has the absolute power to police its own territory, let us add that the sovereignty of the coast State extends 3 miles beyond the low-water mark, or rather the distance of cannon range, and that this extension of the maritime frontier is to insure the defense and security of the State.¹ So that this is not a right of jurisdiction or ownership as broad as on the continent and the legislative acts which have from time to time governed territorial waters fully prove that the assimilation of territorial waters to the continental territory is not absolute. Besides these statutes deal only with English subjects and vessels and are only for the protection of England.²

The offense was said to be subject to German jurisdiction; neither common law nor the statutes and the jurisprudence of the high admiralty courts authorized the jurisprudence of the English courts. Nor could the expressed or tacit approbation of the civilized States be brought into the argument.

Sir Travers Twiss³ claims that it is right that the lack of jurisdiction was recognized:

If the majority of judges had proclaimed the competency of the criminal jurisdiction of the English Admiralty . . . the jurisdiction thus upheld would have constituted a lame jurisdiction, absolutely incapable of satisfying the ends of justice as regards the navigation of the high seas.

¹ Lord Stowell, 3 Robinson's Rep., 352, in *The Twee Gebroeders*; United States v. Kepler, Circuit Court Pennsylvania, Baldwin's Rep., vol. 1, pp. 15, 17. Merlín, *Répertoire de jurispr.*, vol. 16, p. 135. Ortolan, *Diplomatie de la mer*, vol. 1, pp. 174 and 175. Bluntschli, *Le droit international codifié*, liv. iv, secs. 319 and 322.

² Customs consolidation act, 16 and 17 Vict., c. 10, sec. 12; Foreign enlistment act, 33 and 34 Vict., c. 90, secs. 14, 17, and 18; Vict., c. 104, pt. 9, sec. 502; pt. 10, secs. 517, 527. Merchant shipping act amendment, 18 and 19 Vict., c. 91, secs. 21, 25, and 26; Vict., c. 63, secs. 64, 26, and 37 Vict., c. 85, secs. 16 and 17.

³ Sir Travers Twiss, *Law Magazine and Review*, February, 1877.

May we be permitted to contradict these assertions, and to show that these authors have supported this doctrine so as not to assimilate the territorial waters to the territory; this distinction is legitimate, but we may add that the coast States can be accorded certain rights on the territorial waters without assimilating them to the territory itself. Moreover, it would be desirable to establish uniform laws of international navigation, as well as a uniform penalty for the infringement of these laws, and to create international courts for enforcement of these penalties. Moreover, many improvements have been attempted and accomplished in this matter. One must, however, not be carried away by entirely selfish and personal motives along the path of these reforms, and claim, like a member of the English Parliament, Mr. Gorst, that the territorial waters should be included in the domain of the crown, and that the State should exercise justice over them.¹

This question of jurisdiction caused the introduction of several bills in 1877, but none were accepted. It was only in 1878 that a bill which was drafted by the Government itself was readily passed by the House of Lords, but criticized in the House of Commons, which finally adopted it. This bill was made a law the 16th of August, 1878.² It was formally declared that the lawful jurisdiction of England had always extended on the coast of the United Kingdom, and other British possessions, as far as necessary for the defense and protection of these possessions and that the regulations did not apply to warships.

According to article 2 of this law :

An offence committed by an individual on the high seas, in the territorial waters of Her Majesty's possessions, whether he is a subject of Her Majesty or not, is subject to the jurisdiction of the admiral, even though it be committed on a foreign vessel or by using a foreign vessel; consequently the offender is liable to arrest, judgment, and punishment.

Article 3 explains that the proceedings provided by the foregoing article can take place only with the approval of one of the principal secretaries of State to Her Majesty, and on his declaring the fitness of the proceedings. Article 7 provides that the offenses contemplated are those committed on territorial waters, and these comprise all that portion of the high seas situated within 1 marine league from the coast, measured at low tide.

This law from the start met with strenuous opposition, so the lord chancellor endeavored to demonstrate that each country has a right to legislate in this matter; this was necessary to refute the position

¹ The Attorney General did not reject the bill introduced by Mr. Gorst, but desired a delay. See the *Revue maritime*, 1877, p. 809, and the *Times* of the 19th of April, 1877.

² An act to regulate the law relating to the trial of offences committed on the sea within a certain distance of the coasts of Her Majesty's dominions. (41 and 42 Vict., c. 73.)

of the judges, who in the case of the *Franconia* had not only contested the jurisdiction of the English courts, but had even claimed that such jurisdiction could not even be conferred upon them by Parliament. It was then proved that jurisdiction in the territorial waters was necessary for the safety of the inhabitants of the State, and they tried to demonstrate that such a right had always been acknowledged. Finally, the opinion of several jurists was asked, and it was declared that the controversies, if any, dealt rather with the extent than the existence of this right; it is generally admitted that the jurisdiction of the State ends at 3 miles. If there is cause to legislate in this matter, it is not to overthrow existing theories, but merely to fill this lamentable deficiency.

It was especially in the House of Commons that arguments to the contrary were sustained. The proposed bill is useless, was the contention, for the existing law is sufficient, and a theory contrary to international law must not be established under the fallacious pretext of remedying a legislative defect. Let us suppose, for instance, that an Englishman is killed by a Frenchman at Calais, and that the latter subsequently flees to England, it must not be concluded therefrom that he will be amenable to the English courts; it will, however, not be argued that there is a defect in the law. In the case of the *Franconia*, England had only one course open—to demand of the German Government the prosecution of the guilty captain.

It is certain that the coastal State has a certain right of jurisdiction over its territorial waters, but the question is within what limits this jurisdiction will be exercised. In the foregoing case the law of the country whose flag the offending vessel carried had to be applied. To assimilate the territorial sea to the territory itself is a serious matter and the consequences are grievous; it would go as far as forbidding the sailing of foreign vessels in these waters, and, admitting reciprocity, subject English vessels, sailing along the territory of the tribes of India and Polynesia, to the laws of more or less civilized countries. It is true that article 3 of the English law requiring the approval of a secretary of State furnishes a palliative, but the remedy is far from sufficient.

The authority and jurisdiction given to the coast State should have for its object and limit the protection of that State. There is now too much differences in the laws and penalties of the different States to subject their vessels to the law of the coast State in the territorial waters. Let France pass a law like that of England and the sailing of the channel will be forbidden to vessels which want to reach the North Sea. Is not this a result contrary to the law of nations? Desire to do well has led English jurists too far. We must, however, admit that this error comes probably to a certain extent from a misconstruction of the term "territorial sea"; there is a temp-

tation to assimilate these territorial waters to the territory itself, although there are between the two great differences.¹

We have already seen on what measure the right of jurisdiction should be exercised. Let us add that if the English have cited the opinion of several jurists to uphold them we can also justly invoke against them the quotations of eminent authors. It is thus that in 1877, at the English association for the progress of social science, Mr. Sheldon Amos read a paper in which he regretted this assimilation of the territorial waters to the territory and conceded to the coast State a sovereignty and jurisdiction founded on and limited to the protection of the territory.

Before the vote on the English bill, Sir Travers Twiss² claimed that this project of law was exorbitant. Mr. Perels³ made the same remark, declaring that this distribution gives to the territorial jurisdiction an extension which is not in accord with international principles, and is a contradiction to the solutions formerly indorsed by the English publicists and jurists. According to Bluntschli,⁴ "vessels which sail along the coast of a State in that portion of the sea which is a part of the territory of the latter, are subject temporarily to the sovereignty of that State in as much as they must respect military and police regulations adopted for the security or protection of its territory and coast population. The jurisdiction of the coast State extends on the neighboring sea only as far as is judged necessary by the police and military authorities. The vessel is, in other respects, as free as it would be on the high seas; that is to say, that it is considered as a floating part of the territory to which it belongs."

Mr. Arthur Desjardins also criticizes the phrase 'territorial sea,' as leading to confusion, and the judgment of incompetency rendered in the case of the *Franconia*. It is necessary above all to guard the rights of individuals, insure respect of justice, and the independence of nations. England must use with moderation the power given her by law and curb her domineering ambitions; therefore it would have been preferable to restrict by laws the action of the Government, rather than to trust to its discretion.

In France most writers on criminal jurisprudence⁵ admit the exercise of local jurisdiction in territorial waters, and that is the result of the complete assimilation which they wrongly establish between the territorial waters and the territory itself.

¹ *Journal du droit privé*, 1879, p. 242. (Article published by Mr. Renault.)

² *Law Magazine*, May, 1877. (Article published by Sir Travers Twiss.)

³ Perels, *Droit maritime international*, pp. 98 and 99.

⁴ Bluntschli, *Droit international codifié*, article 322 and note under this article.

⁵ Mr. Arthur Desjardins, *Traité de droit commercial maritime*, vol. 1, no. 6, p. 10.

⁶ Ortolan, *Éléments de droit pénal*, sec. 929. Foelix, *Traité de droit international privé*, vol. II, sec. 543, p. 260. Faustine-Hélie *Traité de l'instruction criminelle*, vol. II, sec. 126, p. 509.

The principle of the territoriality of vessels is not universally admitted; discussed at the International Maritime Congress at Naples, it was rejected in spite of the protests of eminent authorities.¹ Mr. Carnazza-Amari claims that it should be affirmed by all nations, especially as its results would be very advantageous; it would add to the freedom of commerce by establishing the inviolability of neutral vessels, by doing away with the right of search and also by establishing the inviolability of the enemy's property even under its national flag.

The territoriality of the vessel necessarily carries with it the law of the flag; besides, this law is preferable to the *lex rei sitae* and to the *lex fori*, in that it is more uniform. It is the system proposed by Messrs. Pasquale Fiore,² Asser,³ Labbé, De Courcy, and Clunet.

Mr. Lyon-Caen⁴ claims that in conflicts of maritime laws one must not consider only the ordinary principles of international law, but that it is necessary to favor and facilitate the maritime and commercial intercourse of the States. He concludes that it is preferable to apply the law of the vessel's flag, and that this theory exclusively applied to vessels on the high seas should be extended to those sailing on the territorial waters or in the ports of a foreign State. In spite of incessant voyages, the vessel, says this author, remains always the same and retains its nationality; therefore the laws of the country of its origin must be applied to it, so long as they are not contrary to the laws of public policy of the foreign States. French jurisprudence is not yet well settled on this question of principle, but its most recent decisions seem to be in contradiction to the foregoing doctrine; consequently it is severely criticized⁵ by Mr. Lyon-Caen.

In conclusion, we will state that if in the general interest of maritime commerce each sovereignty applies on its territory the national laws of the vessel, the rights of this sovereignty must be protected in such a manner that it may apply its laws to foreign vessels.

LAWRENCE: War and Neutrality in the Far East. Second edition, 1904.

Page 93.—A discussion on a moot point of neutral procedure when navigating the high seas, leads naturally to a further discussion of certain matters connected with belligerent procedure in the open waters which are part of the common highway of all nations. The

¹ *Acts of the First International Maritime Congress*, compiled by Betocchi, pp. 75 and 348.

² Pasquale Fiore, *La Legge*, 1882, No. 9, p. 317 *et seq.*

³ Asser, meeting of the Institute of International Law, 1882.

⁴ Mr. Lyon-Caen, Reporter to the Institute of International Law upon the conflict of laws in the fields of maritime law. Lyon-Caen, *Etudes de droit international privé maritime* (*Journal du droit international privé*, 1877, p. 479).

⁵ Court of Rouen, July 31, 1876. *Sirey*, 1877, 2, 129, and the note by Mr. Lyon-Caen.

question, or rather the group of questions, to which we refer, grew out of the sinking of the Japanese battleship *Hatsuse*, by a marine mine on May 15, when she was cruising 10 miles south-east of Port Arthur, and therefore out on the high seas a considerable distance beyond Russian territorial waters. A month before, on April 13, a Russian battleship, the *Petropavlovsk*, had been destroyed by a Japanese mine or mines. But as the catastrophe took place in the outer roadstead of Port Arthur, and at no very great distance from the shore, it was felt to be a legal, though terrible, incident of warfare. No one disputes the right of belligerents to lay mines in their own territorial waters, or those of their foes, as a means of strengthening the defenses of harbors, or assisting attacks upon them. But when the area of destruction is extended to the high seas, questions of legality immediately arise. The sinking of the *Hatsuse* was discussed at once by the press of the civilized world.

Page 97.—All other views being unlikely, we seem driven by a process of elimination to the idea that a mechanical mine left adrift was the agent of destruction in the case before us.

Page 100.—We pass now from conjecture about fact to discussion about law. Immediately we find ourselves face to face with a difficulty which is serious in all legal systems, and especially serious in that which is called International Law. There are no precedents. Mines are not new. They have been used on land since the introduction of gunpowder. But the first to employ them successfully at sea were the Confederates, who mined their harbors, and blew up several of the attacking or blockading ships. This was in the American Civil War of 1861–1865; and since that time vast improvements have been introduced in the apparatus of submarine defense. But though mining as an art has been revolutionized, the practice of it has been confined to the ports and territorial waters of belligerent powers. The recent case is the first in which a mine acted far out at sea. How is an unprecedented situation to be met in International Law? The first thing to be done is to see whether any universally admitted principles apply to it, and, if they do, to apply them. The next is to endeavor to bring about some measure of international agreement as to future treatment of similar situations. The best method for securing this is a Conference. One is due to codify the laws of warfare at sea, as the laws of warfare on land were codified at The Hague in 1899. But we must wait for it at least till the close of the present war, and probably a good deal longer. Meanwhile discussion tends to clarify opinion; and it is certain that no new chapter will be added to the law of nations till the general opinion of the civilized world has pronounced strongly in favor of it.

International Law regards as fundamental the distinction between the high seas and territorial waters. The former are the common

highway of all nations. The only purpose for which they may not be used in piracy. Even the slave-trade can not be put down upon them without an agreement between the States concerned. Belligerents are free to carry on their warlike operations in all parts of them; but neutrals are equally free to carry on their lawful trade. Neither can set apart a zone of ocean into which the other may not intrude; yet neither can so use the right of passage as to interfere with the legitimate purposes of the other, among which purposes the operations of war must be reckoned. Wanton obstruction of one by the other is forbidden. There must be give and take on both sides.

On the other hand, territorial waters belong to the State which owns the adjacent land, and are under its jurisdiction. It throws them open to the visits of ships of all powers with which it is at peace. But it is not bound to do so, the only absolute rights they can claim in the matter being a right of asylum when in danger of destruction from the violence of wind and wave, and a right of innocent passage when the water-way between two portions of the high seas passes through the territorial zone. Neutral waters are as free from warlike operations as neutral land. The belligerents may attack each other's ports, harbors, and bays, but with this their right to perform acts of war in territorial waters begins and ends. Their power of destruction is, however, more absolute there than on the high seas; because it is not conditioned by equal rights of navigation on the part of neutrals, and moreover it has a proprietary aspect which is permanent as to their own waters, and temporary as to those which they hold in warlike occupation. They may perform in such marginal seas acts of hostility which would not be tolerated in the open ocean. No objection has ever been taken against the use of weapons which command them from the land, however destructive they may be; and when marine mines were invented they were placed as a matter of course in the ports and harbors of States which expected attack from the sea. No explicit rule of International Law gave permission; but neither, on the other hand, could any prohibition be quoted. The accepted principles were extended by analogy to the new situation. Similarly, the attacking party used without question all the means which science placed at its disposal. Nothing came of the British protest in 1861 against the action of the Federal forces in blocking up some of the approaches to Charleston and Savannah by means of vessels sunk in the channels. Mr. Seward, the American Secretary of State, replied that the obstructions would be removed when the war was over and the Confederacy vanquished, and there the matter ended. In the present war no one, even in Russia, has hinted that the Japanese went beyond their rights in attempting to block the channel leading to the inner harbor of Port

Arthur by sunken merchantmen, or in mining the sea pathway which they had observed the Russian ironclads to take when going in and coming out.

If it be right to extend admitted principles to new cases when they are concerned with territorial waters, it cannot be wrong to use them in like fashion when we are dealing with the open ocean. Here the rule is one of concurrent rights on the part of belligerents and neutrals; and there are no ideas of proprietorship to be reckoned with, for it is held that the high seas are incapable of appropriation. Surely this rule contains an implicit prohibition of the use of such means of destruction as shall prove a lasting danger to neutral vessels, when no measures of active hostility are going on in the neighborhood to act as a warning against approach. It has been construed from time immemorial to mean that neutral onlookers at a naval engagement are present at their own risk. It would be deemed to justify the capture, and even the destruction, of a neutral vessel which persistently hampered warlike operations. The Hague agreement for extending the principles of the Geneva Convention to maritime warfare expressly stated that belligerents might control and order off hospital ships. They might "even detain them, if important circumstances require it." If, then, warring fleets may order off, and in extreme circumstances destroy, neutral vessels which theoretically have as much right to be on the open ocean as they themselves have, conversely neutrals must be protected against the use of means of destruction which would do away with security of navigation, when issue of battle was not openly joined to be a sign to all and sundry that they approached the spot at their peril. The right to fight at sea, if it is to be conditioned, as heretofore, by the right to trade at sea, must be limited to fighting by open and avoidable means.

We will now endeavor to apply these considerations to the questions which have arisen out of the destruction of the *Hatsuse*. If she was blown up by a torpedo, discharged at close quarters from a submarine, or at long range from the shore or a torpedo boat, there was no more violation of International Law than if her magazine had been exploded by a shell from one of the forts. The torpedo was aimed directly at her, and no neutral merchantman would have been in danger, unless she had come much closer than such vessels ought to approach to fighting ships. If the agent of destruction was a floating mechanical mine, which had got adrift owing to one or other of the operations we have already described, it is difficult to say that any existing rule of law was broken, though one may ardently desire some strong restraint upon the carelessness which strews the sea with floating death. But if a mine-field was deliberately created out in the open ocean by the Russians, in such a position that it was as

likely to destroy a peaceful neutral as an enemy's warship, words fail to express the reprobation with which the act must be regarded. It is not only illegal, but cruel in the highest degree. Neutral States would be justified in calling Russia to account very sharply, and stating their intention of claiming exemplary reparation should any vessels of theirs be lost in the mined areas. The argument that if the Japanese fleet may bombard Port Arthur from a distance of 8 miles, which is far outside territorial waters, the garrison of the fortress may reply by any form of counter-attack misses the point completely. The forts have full liberty to return shot for shot. Torpedo attacks may be made by any means which involve attempts upon the enemy's ships and no others. But the setting of a concealed death-trap in a place where it is as likely to injure neutrals as foes is a mode of warfare contrary to all former practice and to all sound principle. The evidence available at present hardly bears out the common idea that this was done, and without the clearest proof we should hesitate to believe that such an outrage was perpetrated. The still more horrible story of the employment of Chinese junks to dump cargoes of infernal machines down upon the open sea, careless of where they floated and whom they destroyed, supposes a defiant recklessness and a wicked disregard of human life which would be a disgrace to the most hardened criminal. It is incredible without attestation infinitely stronger than vague reports.

Professor Holland has pointed out, in his admirable letters to the *Times* on this subject, that it is not always easy to know where the line should be drawn between territorial waters and the high seas. There is general agreement with regard to the marine league; but this applies to the ordinary coast-line and not to bays, estuaries, and indentations, to say nothing of narrow straits. Some of these are dealt with by special compact. In the absence of a definite agreement, what is called the 10-mile rule is often adopted. Under it, all within an imaginary line drawn from point to point across an inlet is territorial water, as long as the line in question is not more than 10 miles in length; and all outside is part of the high seas, except that the marine league is measured from the imaginary line. We cannot, however, attribute universality to this rule. The whole subject needs reconsideration. There has sprung up of late years a strong body of opinion in favor of a large extension of territorial waters. The marine league was adopted when the utmost range of cannon was 3 miles. It is now about 12; and in addition artillery fire is much more accurate and destructive than it was a century and a half ago. In 1894 the *Institut de Droit International* adopted at Paris resolutions in favor of the extension of the territorial zone to 6 miles, with power to a neutral State to claim further extensions for the purposes of protecting its neutrality, as long as they did not exceed the utmost.

range of cannon mounted on its shores. In the case of bays and inlets the 10-mile line was to be replaced by one of 12 miles. The events we have been describing will give an impetus to the movement for change. Nothing can be done without an International Congress, and at present the prospect of one seems remote. Even if it were assembled, the innate conservatism of some states would be overcome with difficulty. As late as June 2, 1904, Earl Percy, the Under-Secretary of State for Foreign Affairs, stated in the House of Commons that His Majesty's Government were not prepared to recognize any extension of the 3-mile limit. The arguments in favor of enlarging territorial waters are very strong; but it will be necessary to proceed with caution, lest unexpected and unwelcome results follow upon changes which were meant to promote the general good. A better example could hardly be found than was recently given by Vice-Admiral Sir R. H. Harris, when he pointed out that if belligerents were allowed to lay mines up to a 10-mile limit from their shores, and England and France were unfortunately at war, life would not be worth living for the crews of neutral merchantmen who might attempt to navigate the Straits of Dover.

LAWRENCE: *The Principles of International Law. Fifth edition, 1913.*

EXTENT OF A STATE'S TERRITORIAL POSSESSIONS.

Page 140, §72.—We will now proceed to a consideration of the rules of International Law with respect to the important group of subjects connected with a State's territorial possessions. We will begin by endeavoring to answer the question, Of what does a State's territory consist? It consists, first, of the land and water within that portion of the earth's surface over which the State exercises rights of sovereignty. All rivers and lakes that are entirely within its land boundaries are as much its territory as the soil they water. And if a river flows through several States, each possesses in full ownership that portion of the course which passes through its territory. But if one State holds the land on one bank of a river and another State possesses the opposite bank, the boundary line between them is drawn down the middle of the navigable channel, and includes the islands on either side, except when established custom or a treaty still in force gives to one of them the whole stream. The same rule holds good of frontier lakes, such as Lake Ontario, the northern shore of which is Canadian territory while its southern coast belongs to the United States. In all these cases it will be noticed that water is held to be appurtenant to land, not land to water. The rules concerning them

are taken with scarcely any alteration from the *jus gentium*, and are part of that heritage of Roman Law with which Grotius and his fellow-workers endowed the international code.¹

Secondly, a State's territory includes the sea within a 3-mile limit of its shores. Along a stretch of open coast line the dominion of the territorial power extends seaward to a distance of 3 miles, measured from low-water mark. The rule of the marine league was introduced at the beginning of the last century as a practical application of the principle laid down by Bynkershoek² and others, that a State's dominion over the sea should be limited to that portion of it which she can control from the land by means of her artillery, this being obviously all that can be needed to provide for her own safety. Her sovereign rights were to extend *quousque tormenta exploduntur*. And as at that time the furthest range of cannon was about 3 miles, the accepted maxim, *Terræ dominium finitur ubi finitur armorum vis*, seemed to dictate the marine league as the appropriate distance. Opposing views gradually died out, though remnants of them survived into the recent past, as was shown by the claim of Spain to 2 marine leagues round the coast of Cuba, which was stoutly opposed by Great Britain and the United States,³ and came to an end when the latter power deprived Spain of the island in 1898. There can be no doubt now that, whatever difficulties may still linger as to bays and indentations, the rule we have laid down rests upon the solid basis of general consent. It gives to a maritime State reasonable security from attack, the needful control over shipping, and protection for the population of its coast line in the enjoyment of the means of subsistence that they derive from their proximity to the sea.⁴ It has been adopted not only in the domestic legislation of maritime States, but also in great international documents, such as the North Sea Fisheries Convention of 1882, which defined territorial waters as those which came within 3 miles, measured from low-water mark along the coast of each of the signatory powers.⁵ A few attempts have been made in recent times to extend the limit in order to keep pace with the increased range of modern artillery. For instance, in 1863 Mr. Graham, the United States consul at Cape Town, demanded the release of the Federal merchant vessel, the *Sea Bride*, which had been captured by the Confederate cruiser *Alabama* within 4 miles of the shore, but outside the 3-mile limit. He based his demand upon the doctrine that since the invention of rifled cannon territorial waters extended to at least 6 miles. The British governor of Cape Colony

¹ Justinian, *Institutes*, bk. ii, tit. i, 22, and *Digest*, bk. xli, tit. i, 29; Moore, *International Law Digest*, vol. i, pp. 616-621.

² De Domino Maris, ch. ii.

³ Wharton, *International Law of the United States*, §§ 32, 327.

⁴ Perels, *Seerecht*, § 24.

⁵ Hertslet, *Treaties*, vol. xv, p. 795.

declined to interfere, on the ground that the rule of the marine league held good.¹ Mr. Graham's action was not seriously backed by his Government; and it may be taken for granted that, in spite of tentative efforts at alteration² the rule of the 3-mile limit is a valid part of modern International Law. But a tendency to reopen the question is showing itself, and is amply justified by the increase of the range of cannon from 3 to 15 miles. The Institute of International Law discussed the matter at Paris in 1894. It drew a sharp distinction between territorial waters and waters over which a neutral State should be allowed to exercise the authority necessary to enforce its neutrality. On the ground that the marine league is insufficient to protect coast fisheries, it suggested the extension of the territorial zone to 6 miles; and it gave each neutral State power to declare to belligerents the number of marine miles it deemed needful for the guaranty of its neutrality, provided they did not exceed the range of cannon mounted on the shore. The maritime powers were recommended to meet in congress to adopt these and other rules.³ States are, however, hard to move. The suggested congress has never been held. As late as 1904 the British Government declared in the House of Commons that it was not prepared to recognize any extension of the 3-mile limit, and early in 1911 it protested against a Russian attempt to extend the limit to 12 miles to protect the Archangel fisheries.⁴

In the third place, a State is held to possess, in addition to the marine league, narrow bays and estuaries that indent its coast, and narrow straits both of whose shores are in its territory. The case of such straits is ruled by a simple deduction from the principles already laid down. If the passage is less than 6 miles across, it is wholly territorial water, because a marine league, measured from either shore, covers the whole expanse. If it is more than six miles across, a league on either side belongs to the territorial power and the mid-channel is part of the open sea, which belongs to no State but is common to all for use and passage. Usage, however, sometimes modifies this rule. For instance, the Straits of Fuca, between Vancouver Island and the territory of the United States, are divided throughout into British and American waters, though they vary in width from 10 to 20 miles. With regard to bays and estuaries there is more doubt. The principle that such of them as are narrow should belong to the State that possesses the adjacent land, is universally admitted. For its own protection against possible

¹ British Parliamentary Papers, *North America, United States* (1864), vol. lxi, pp. 19-29.

² Bluntschli, *Droit International Codifié*, § 302; Phillimore, *Commentaries upon International Law*, part iii, ch. viii.

³ *Annuaire de l'Institut de Droit International*, 1894-95, pp. 281-331.

⁴ *London Times* of June 3, 1904, and Feb. 25, 1911.

enemies it is entitled to exercise the powers of ownership over what are really gates leading into its dominions. But when we come to define the exact extent of the waters that may properly be appropriated in pursuance of this principle, we find no general agreement. If the distance from point to point across the mouth of a bay is not more than 6 miles, that bay becomes territorial water under the accepted rule of the marine league. There is, however, a disposition to hold that the distance should be extended; but at present the common consent of nations has not fixed upon a generally accepted limit, though there is a considerable amount of authority in favor of 10 miles. This was the rule adopted in the Fishery Convention of 1839 between Great Britain and France;¹ but the Institute of International Law at the Paris meeting to which we have already referred voted by a large majority in favor of raising the limit to 12 miles. The mixed commission appointed under the provisions of the Convention of 1853 between the United States and Great Britain for the purpose of settling claims made by the citizens of each nation upon the government of the other, dealt with fishery disputes, and decided against the claim of Great Britain that the Bay of Fundy was British territorial water, on the ground, among others, that the distance from headland to headland across its opening was greater than 10 miles.² In 1888 a Fishery Treaty was negotiated at Washington between the two powers, but failed to come into operation on account of the refusal of the Senate of the United States to ratify it. It is, however, important for our present purpose, because it adopted the 10-mile line in the case of bays, creeks, and harbors not otherwise specially provided for by its articles.³ But it cannot be said that there is a definite rule of international law on this matter, as there is in the case of the marine league. The claims of States to large tracts of marginal waters—claims which are themselves relics of yet wider claims to dominion over oceans and seas—increase the difficulty of the question. Some of them are dead or dormant; but when a valuable fishery is retained for native fishermen by the assertion of sovereignty over a bay of considerable size, or when considerations of self-protection or political advantage are prominent, we find that States insist upon and often obtain recognition of their demands, some of which are based upon very ancient precedent. Thus the Dutch claim to regard the Zuyder Zee as territorial water is generally recognized, and some writers hold that the United States possesses in full ownership Chesapeake and Delaware bays.⁴ Great Britain has almost forgotten

¹ Hertslet, *Treaties*, vol. v, p. 89.

² Wheaton, *International Law* (Dana's ed.), note 142; Moore, *International Law Digest*, vol. 1, pp. 785-787.

³ British Parliamentary Papers, *United States*, No. 1 (1888).

⁴ Ortolan, *Diplomatie de la mer*, vol. II, ch. VIII, p. 163; G. F. de Martens, *Précis*, §42; Kent, *Commentary on International Law* (Abdy's ed.), pp. 113, 114.

her pretensions to sovereignty over what she called the King's Chambers; that is to say, portions of open sea, cut off by drawing imaginary lines from headland to headland along her coast; but they have never been formally withdrawn.¹ And by the Fishery Convention of 1889, already alluded to, exceptions were allowed to the 10-mile rule laid down in it. The utmost we can venture to say is that there is a tendency among maritime States to adopt this rule, and probably it will in time become the law of the civilized world. It is, however, universally conceded that when a bay or estuary is territorial water, the marine league is to be measured from the imaginary line across its entrance. . . .

RIGHTS OVER WATERS.

Page 185, § 85.—(1) Claims to sovereignty over the high seas.—We must now turn our attention to territorial rights over waters, and the claims of States to exercise sovereign authority in connection therewith. It was impossible to deal with these questions when we were discussing the limits of territorial possession; and they were reserved for consideration after we had investigated the subject of international title. The interest of some of them is chiefly historical, while others are matters of importance in our own day. We shall, however, be better prepared to grapple with the latter if we have some knowledge of the former.

We will take first the subject of

Claims to sovereignty over the high seas.

Originally the sea was perfectly free, though, as Sir Henry Maine justly says, it was common to all "only in the sense of being universally open to depredation."² In Roman Law it was one of the *res communes*.³ But in the Middle Ages the maritime powers of Europe claimed to exercise territorial sovereignty over those portions of the high seas which were adjacent to their land territory or otherwise in some degree under their control. Thus Venice claimed the Adriatic, Denmark and Sweden declared that they held the Baltic in joint sovereignty, and England asserted a claim to dominion over the seas which surround her shores from Stadland in Norway to Cape Finisterre in Spain, and even as far as the coast of America and the unknown regions of the North.⁴ Denmark put in a counterclaim to the Arctic seas, and especially to a large zone round Iceland where there were valuable fisheries. These claims, monstrous as they seem to us, were by no means an unmixed evil in mediæval times, when

¹ Walker, *Science of International Law*, p. 170, notes 3 and 4.

² *International Law*, p. 76.

³ Justinian, *Institutes*, bk. II, tit. 1. 1.

⁴ Selden, *Mare Clausum*, bk. II, ch. 1.

piracy was a flourishing trade, and pirate vessels were strong enough to insult the coasts of civilized powers and make captures in their harbors. The State that claimed to possess a sea was held bound to "keep" it, that is, to perform police duties within it, and this obligation was fulfilled with more or less completeness by England and other maritime powers. Moreover, the claim to dominion was not deemed to carry with it a right to exclude the vessels of other nations from the waters in question. Tolls were often levied to provide the funds for putting down piracy and keeping the peace of the seas, and licenses to fish were given to foreigners in consideration of a money payment. In fact, no serious grievance appears to have been felt till after the discovery of America. That event gave a great impetus to trade and navigation, and at the same time excited a strong desire on the part of the Spaniards to be the sole possessors of the wealth of the New World. Accordingly, they not only claimed the Pacific Ocean as their own by right of discovery, but also strove to exclude from it the vessels of other powers. About the same time Portugal adopted a similar policy with regard to the Indian Ocean and the newly discovered route around the Cape of Good Hope. The other maritime nations set at naught these preposterous claims. French and English explorers traded, fought, and colonized in America with scant respect for the so-called rights of Spain; and Holland sent her fleets to the Spice Islands of the East without troubling to ask leave and license of Portugal. The rulers and jurists of these aggressive nations sought a theoretical justification of their acts in the new doctrine, or rather the old doctrine revived, that the sea was incapable of permanent appropriation. Elizabeth of England told the Spanish ambassador at her Court that no people could acquire a title to the ocean, but its use was common to all. Grotius of Holland published a learned argument in favor of its freedom in 1609. He afterwards modified his views so far as to allow that gulfs and marginal waters might be reduced into ownership as attendant upon the land;¹ and in this latter form the principle of the freedom of the seas from territorial sovereignty became one of the fundamental doctrines of modern International Law. Selden in his *Mare Clausum*, published in 1635, supported the claim of England to dominion over the northern seas, but rather on the ground of immemorial prescription than on general principles. Even then the enforcement of such claims was against the spirit of the age, and they began to dwindle from the middle of the seventeenth century. For more than a hundred years after Great Britain had ceased to exercise any real powers of sovereignty over the seas she still called her own, she claimed within their limits ceremonial honors to her flag; and

¹ *De Jure Belli ac Pacis*, bk. II, ch. III, 8.

till quite recent times Denmark endeavored to reserve a large area around the coast of Iceland for the exclusive use of her fishermen. But the British demand for salutes and the lowering of the flag has been tacitly dropped for generations, and Denmark, after various concessions, gave up the struggle in 1872, and fell back on the 3-mile limit allowed by International Law.¹

§ 86.—*Rights over waters.* (2) *The American claim to prohibit seal-fishing in Bering Sea.*—The last attempt to enforce exclusive claims over a portion of the open ocean was made by the United States in the controversy with Great Britain that terminated in the Bering Sea arbitration of 1893. In the year 1821 the Emperor Alexander I of Russia issued an ukase, prohibiting all foreign vessels from approaching within less than a hundred Italian miles of the coasts and islands belonging to Russian America. This proceeding was justified on the ground that Russia had a right to claim the Pacific north of latitude 51° as a *mare clausum*, on the ground of first discovery and the possession of both its shores. Great Britain and the United States at once protested against the ukase and the claims on which it was founded, the American Secretary of State, Mr. John Quincy Adams, pointing out that the distance across the Pacific from shore to shore along the 51st parallel of north latitude was no less than 4,000 miles. He declared that the United States could not admit the existence of an “exclusive territorial jurisdiction” over these waters on the part of Russia, and that they would “maintain the right of their citizens . . . of free trade with the original nations of the northwest coast throughout its whole extent.”² He claimed for them freedom from molestation “beyond the ordinary distance to which the territorial jurisdiction extends.”³ The Russian Government yielded to the remonstrance of the two great commercial powers, and signed a Convention with the United States in 1824⁴ and with Great Britain in the following year.⁵ The terms of these instruments were almost identical. They conceded to citizens and subjects of both powers the right to navigate and fish without molestation in the waters closed to them by the ukase of 1821, and to resort to places on the coast where there was no Russian settlement for the purpose of trading with the natives. Some temporary provisions in the American treaty with regard “to gulfs, harbors, and creeks” were differently interpreted by the two powers, and were not renewed; but the main stipulations remained in force till the United States acquired the whole of Russian America by purchase in 1867. A rapid development of the

¹ Hall, *International Law*, 5th ed., p. 148, note 1.

² *Treaties of the United States*, p. 1379.

³ *British and Foreign State Papers*, vol. 9, p. 483.

⁴ *Treaties of the United States*, p. 931.

⁵ Wheaton, *International Law*, § 170.

country then began, and among other enterprises the seal-fisheries were taken in hand with a view to their improvement. In 1870 a monopoly of the Pribyloff seal-rookeries was given by the American Government to the Alaska Commercial Company,¹ on condition that it paid certain sums annually to the United States Treasury, and killed no seals except on the islands, and not more than 100,000 a year even there. The sealing industry soon became exceedingly lucrative, and vessels from the maritime provinces of the Dominion of Canada were attracted to it. Their crews, not being bound by the restraints imposed by the law of the United States upon American citizens, killed the seals wherever they could find them outside the ordinary limits of territorial waters. The American sealers complained and protested; and in 1886 three schooners belonging to Victoria, British Columbia, were seized while fishing about 70 miles from land, and taken before the district court of Sitka for trial on a charge of infringing the law which forbade the killing of fur-seals within the limits of Alaska and its waters, except under authorization from the Secretary of the United States Treasury. The judge who tried the case laid down in his charge to the jury that the territorial waters of Alaska included the whole of the vast area—1,500 miles in width and 700 miles in depth—bounded by the limits mentioned in the treaty of cession of 1867 as those “within which the territories and dominions conveyed are contained.”² Thus directed, the jury found the prisoners guilty, and the penalties of imprisonment for themselves and confiscation for their vessels and cargoes were enforced against them. Great Britain at once remonstrated. The seizure of other vessels elevated the difficulty to the rank of a great international controversy, which was carried on for several years and threatened more than once to disturb the peaceful relations between the two countries. Happily, however, it was referred to the arbitration of a board of seven jurists, two being appointed by each of the parties to the controversy, one by the President of the French Republic, one by the King of Italy, and one by the King of Sweden and Norway.³ The award of this tribunal was given at Paris, on August the 15th, 1893. The arbitrators found for Great Britain on all the points of International Law in dispute.⁴ They agreed that by the treaty of 1867 Russia ceded to the United States all her rights within the boundaries therein defined; but they held that the jurisdiction over enormous tracts of open ocean claimed by Alexander I in 1821 was not among those rights. International Law

¹ Wharton, *International Law of the United States*, vol. II, p. 272.

² *Treaties of the United States*, p. 940; British Parliamentary Papers, *Correspondence respecting the Behring Sea Seal Fisheries, 1886–1890*, p. 2.

³ Message of President Harrison transmitting Treaty of Arbitration, Feb. 9, 1892, to the Senate, Mar. 8, 1892.

⁴ *London Times*, Aug. 6, 1893.

never gave it to Russia, and she could not cede what she did not possess. Accordingly, the territorial rights of the United States in the waters of Alaska were limited to its bays and gulfs, and the marine league along its shores. America had no property in the fur-seals when found outside those limits, and no power to protect them from seizure on the high seas by the citizens of other countries. At the same time, the tribunal recognized the force of the American contention, that it was necessary to put the fishery under regulations in order to preserve the seal-herd from grievous diminution, if not utter destruction. The treaty of reference gave the arbitrators power to devise such regulations, in case they declared Bering Sea open to the fishing vessels of all nations. They exercised this power, and drew up an elaborate code, which established a close time for seals, forbade their capture within 60 miles of the Pribyloff Islands, decreed that only sailing vessels should engage in the fishery, and laid down many other rules which the two powers brought into effect by means of domestic legislation in 1894.

It can hardly be doubted that the decision of the arbitrators was good in International Law. The claim to exercise rights hardly distinguishable from those of sovereignty over Bering Sea was contrary to principles that had been asserted by no power more vigorously than the United States;¹ and it was extremely difficult to reconcile the action of its government toward the British sealers with the attitude assumed by Mr. Adams in the controversy with Russia provoked by the ukase of 1821.² But even if the American claim did not amount to an assertion of full sovereignty over Bering Sea, a pretension which Mr. Blaine, President Harrison's Secretary of State, expressly disavowed, the exclusive jurisdiction over its waters and exclusive rights in the seal-fisheries, which he stoutly maintained, could with difficulty be justified on other than territorial grounds. The contention that the seals were semi-domestic animals, and as such the property of the United States, will hardly bear investigation. They are wild creatures whom each may catch on his own territory or in localities belonging to no one. The United States can claim no rights over them after they have left American waters; for they are then as much beyond American authority as are the big game of the northwest plains when they have wandered across the border into Canadian territory. The assertion that the destruction of seals at sea is immoral, was an exaggerated statement of the principle that to destroy a useful animal is detrimental to the welfare of the human race. The experts differed widely as to the effect of the sea fishing

¹ Wheaton, *International Law* (Dana's ed.), p. 260, note 108; Wharton, *International Law of the United States*, vol. 1, p. 105.

² Wheaton, *International Law*, § 168; Wharton, *International Law of the United States*, vol. II, pp. 270, 271.

upon the numbers of the seals; but even had the evidence in favor of its disastrous consequences been stronger than it was, the United States would not have been justified in assuming a right to make its own ideas of proper regulation the law of the civilized world. It could legislate for its own citizens in their own vessels on the high seas, not for the citizens of other States lawfully navigating the ships of those States.¹ But undoubtedly it had a strong moral claim on foreign nations for a mutual agreement that should prevent the extermination of the seals. With this end in view the arbitrators drew up regulations, which, however, failed to effect their purpose, largely owing to the entrance into the sealing industry of Japanese, who were not bound by them. Russia concluded an agreement on the subject with Great Britain and the United States, but Japan refused her adherence. At last, in June, 1911, when the seal herd was almost destroyed, the four powers directly concerned agreed on the suspension of pelagic sealing for 15 years. Here we have the beginning of "an International Game Law," which is undoubtedly the true solution of the difficulty.² This, and the decisive assertion of the freedom of the high seas, are likely to be the permanent results of the arbitration. Any claim on the part of the United States which might militate against the received doctrine seems to have been definitely abandoned in 1902, when the American agent in an arbitration with Russia was authorized to declare that "The government of the United States claims, neither in Bering Sea nor in its other bordering waters, an extent of jurisdiction greater than a marine league from its shores."³

§ 87.—(3) *Claims to jurisdiction beyond the marine league.*—Claims to dominion over whole seas may be said to have vanished altogether from International Law. But in the process of departure they left behind them a number of assertions of territorial power over considerable stretches of water along the coasts of maritime States; and it is doubtful how far some of these are alive to-day. Great Britain has never in recent times attempted to exercise the rights of sovereignty over the "King's Chambers"; and though Chancellor Kent declared in favor of the "justice and policy" of her claim to "supremacy over the narrow seas adjacent to the British Isles," and referred with approval to similar claims made early in the nineteenth century by American statesmen, including as they did an assertion of the right to prohibit naval warfare between the Gulf Stream and the Atlantic shore, or at least within a line drawn

¹ British Parliamentary Papers, *Correspondence respecting the Behring Sea Fisheries, 1886-1890*, pp. 398-462; Moore, *International Law Digest*, vol. 1, pp. 898-918, and *International Arbitrations*, ch. xvii.

² Moore, *International Law Digest*, vol. 1, pp. 914-923; *London Times* of June 28, 1911.

³ *Ibid.*, pp. 828-829.

from headland to headland and along the open coast for 4 leagues out to sea,¹ it is fairly certain that no attempt would now be made to enforce these views. Indeed, the general policy of the United States has tended emphatically toward the curtailment of such claims. The opinion of the civilized world sets strongly in this direction; and subject to such extensions of territorial waters as the needs of self-defense may in future secure, we may consider the few cases in which claims to large bays and broad waterways are still allowed as survivals of an older order.

The British Hovering Acts of 1736 and 1784 assert a jurisdiction for revenue purposes to a distance of 4 leagues from the shore, and there are acts setting up a similar claim for health purposes. In 1797, 1799, and 1807 the United States Congress legislated to the same effect, and many maritime nations have embodied the like provisions in their laws.² Dana argues, however, that the right to make seizures beyond the 3-mile limit has no existence in modern International Law, and maintains with regard to the Act of Congress of 1797, that it did not authorize the seizure of a vessel outside the marine league, but only its seizure and punishment within that limit for certain offenses committed more than 3 miles, but less than 12, from the shore.³ It is very doubtful whether the claim would be sustainable against a remonstrance from another power, even in this attenuated form. When it is submitted to, the submission is an act of courtesy. As Twiss rightly and properly says: "It is only under the comity of nations in matters of trade and health, that a State can venture to enforce any portion of her civil law against foreign vessels which have not as yet come within the limits of her maritime jurisdiction."⁴

§ 88.—(4) *The right of innocent passage*.—The next subjects that demand attention are those connected with

THE RIGHT OF INNOCENT PASSAGE.

This may be defined as the right of free passage through the territorial waters of friendly States when they form a channel of communication between two portions of the high seas. There can be no doubt that when both the shores of a strait that is not more than 6 miles across are possessed by the same power, the whole of the passage is regarded as territorial water; and there are instances of wider straits that are deemed to be under the power of the local sovereign. But these territorial rights do not extend to the absolute exclusion of

¹ *Commentaries on International Law* (Abdy's ed.), pp. 113, 114.

² Wharton, *International Law of the United States*, § 82.

³ Wheaton, *International Law* (Dana's ed.), p. 258, note.

⁴ *Laws of nations*, vol. 1, § 190.

the vessels of other States from the waters in question. In the days when whole seas were claimed in full ownership, the powers that owned narrow waterways were in the habit of taking tolls from foreign vessels as they passed up or down the straits. The most famous of these exactions were the Sound Dues levied by Denmark upon ships of other powers which sailed through the Sound or the two Belts, on their passage from the North Sea to the Baltic or from the Baltic to the North Sea. Their origin is lost in remote antiquity. The earliest treaties in which they are mentioned regard them as established facts and recognize the right of Denmark to levy them. In the Middle Ages other States negotiated with the territorial power as to their amount, and sometimes made war upon her to reduce exorbitant demands; but no one denied that a reasonable toll might lawfully be exacted. But with the growth of modern commerce these demands became increasingly irksome; and as the old idea of appropriating the ocean gave way to the doctrine that it was free and open to all, it was felt that the navigation of straits that connected two portions of the high seas was an adjunct to the navigation of the seas themselves, and should be as free in one case as in the other. Accordingly, in 1857 Denmark found herself unable any longer to levy the Sound Dues, though her jurists were able to show a clear prescription of 500 years in her favor. By the Treaty of Copenhagen she gave them up.¹ A large pecuniary indemnity was paid to her by the maritime powers of Europe; but, in order to avoid recognizing by implication any right on her part, the covenanted sum was declared to be given as compensation for the burden of maintaining lights and buoys for the future. In the same year the United States negotiated a separate Convention with her, whereby all tolls on their vessels were abolished, and, in consideration of a covenant on the part of the King of Denmark to light and buoy the Sound and the two Belts as before, and keep up an establishment of Danish pilots in those waters, they agreed to pay him the sum of "three hundred and ninety-three thousand and eleven dollars in United States currency."² These instances show that the common law of nations now imposes upon all maritime powers the duty of allowing a free passage through such of their territorial waters as are channels of communication between two portions of the high seas. The right thus created is, of course, confined to vessels of States at peace with the territorial power, and is conditional upon the observance of reasonable regulations and the performance of no unlawful acts. It extends to vessels of war as well as to merchant vessels. No power can prevent their passage through its straits from sea to sea, even though their errand is to seek and attack the vessels of their foe, or to blockade or bombard his ports. As

¹ Twiss, *Law of Nations*, vol. 1, § 188.

² *Treaties of the United States*, p. 239.

long as they commit no hostile acts in territorial waters, or so near them as to endanger the peace and security of those within them, their passage is perfectly "innocent." The word, as used in the phrase "right of innocent passage," refers to the character of the passage, not to the nature of the ship.

§ 89.—(5) *The special case of the Dardanelles and the Bosphorus.*—It is sometimes supposed that the regulations in force for the transit of vessels through the Dardanelles and the Bosphorus disprove the doctrine we have just laid down as to the extension of the right of innocent passage to ships of war. But a short historical examination of the case will show that it is exceptional, in that it is governed by special treaty stipulations and not by the ordinary rules of International Law. Till 1774, when Russia compelled Turkey to open the Black Sea and the straits leading to it from the Mediterranean to merchant vessels, it had been the practice of the Porte, which did not consider itself bound by the public law of Europe, to forbid the passage of the Dardanelles and the Bosphorus to ships of other powers. After 1774 ships of war were still excluded; and in 1809 Great Britain recognized this practice as "the ancient rule of the Ottoman Empire." She was followed in 1840 by Austria, Russia, and Prussia, who were parties with her to the Quadruple Treaty of London; and France adhered to the arrangement in 1841.¹ The first subsidiary Convention attached to the Treaty of Paris of 1856 revised the rule so as to allow the passage of light cruisers employed in the service of the foreign embassies at Constantinople, and of a few small vessels of war to guard the international works at the mouth of the Danube. A further modification was introduced by the Treaty of London of 1871, which retained the previous rules, but reserved power to the Sultan to open the straits in time of peace to the war vessels of friendly powers, if he should deem it necessary in order to secure the observance of the Treaty of Paris of 1856.² These last two treaties have been signed by the Great Powers, and are universally accepted as part of the public law of Europe. The rules they lay down are binding, but rest on treaty stipulations, and not on the common law of nations. Russia sought to evade their restrictions in her war with Japan (1904–1905) by sending ships of her fleet from the Black Sea into the Mediterranean under her commercial flag, but with fighting crews on board and guns hidden in their holds, and then turning the vessels into warships when they reached open waters. But under the influence of strong representations from Great

¹ Holland, *European Concert in the Eastern Question*, pp. 95–101.

² Twiss, *Law of Nations*, vol. 1, § 189; Holland, *ibid.*, pp. 256–257 and 273.

Britain, some of whose merchantmen had been captured by the converted cruisers, the attempt was abandoned.¹

The case of the Dardanelles and the Bosphorus is therefore an exception to ordinary rules, and instead of proving that the right of innocent passage does not extend to vessels of war, it proves the exact contrary; for, if the principle of exclusion applied under international law, there would have been no need of a long series of treaties in order to bring it into operation. It may be added, that when the regular channel for navigation between two parts of the high seas runs through marginal waters, there is a right of peaceful passage along it, which may not be denied or impeded by the territorial power. The accepted modern principle is, that the waterway between open seas is an adjunct of the seas themselves and may be navigated as freely as they. But in 1912 this right of free navigation came in conflict with the right of self-defense. Turkey mined the Dardanelles to prevent the passage of the Italian fleet to Constantinople. After a time, in deference to neutral remonstrances, the mines were removed and the straits opened to merchantmen. There is need of an international agreement to provide for such cases.

VON LISZT: *Das Völkerrecht*. Fifth edition. Berlin, 1907.

Section 9, page 86.—V. Coastal waters (the territorial sea, better named the coastal or littoral sea, the maritime belt) do not belong to the adjacent State.

Coastal waters are those parts of the open sea which the adjacent State may control from the coast. The determination of the limit of the coastal waters is disputed. Ancient literature accepted cannon-shot distance "*terræ dominium finitur, ubi finitur armorum vis*." In the modern law of Germany and other countries, as well as in the most important modern treaties, the distance is frequently established at 3 sea miles (5,556 m.), this distance to be reckoned from low-water mark. This is stated in Article 2, paragraph 1, of the Convention of the North Sea States of May 6, 1882, concerning the regulation pertaining to the police of fisheries in the North Sea, outside the coastal waters:² . . .

But we can not speak of a general recognition of this method of calculation. The objection to the "three-mile zone" is that formerly it may have corresponded with the extent of cannon distance, but that now, in expert tests, the distance would amount to from 5 to 7 miles, or 9 to 12 kilometers. In deciding the boundaries you have to go on this principle; you define the littoral rights from the point

¹ Lawrence, *War and Neutrality in the Far East*, 2d ed., pp. 200–218.

² See *post*, p. 286.

of view of the defense of the State on the one hand, and on the other, their power to maintain this. The border of coastal waters must extend as far as the adjacent State is able to assure its jurisdiction and interest. For this reason it is advisable to return to the old rule by which the utmost border of coastal waters is determined by cannon shot. Certainly each adjacent State can make the extent narrower, or measure it differently for the execution of its different laws; thus make the extent greater for customs and sanitary police than for the exercise of jurisdiction, taking it for granted that they stay all the time within cannon distance.

Coastal waters are not territory, but the adjacent State has power to exercise certain sovereignty in the coastal waters. It can consequently be said that the adjacent State has a limited territorial supremacy over the coastal waters.

That the coastal sea can not be considered as territory of adjacent States becomes a simple matter. If a child is born on a Swedish vessel which is sailing on the adjacent waters of the Baltic Sea, this child, as every one admits, is not born in Germany but in Sweden. If a sailor on board a French vessel plowing through German coastal waters is killed by another, the crime is, without question, committed in France not in Germany.

The real position of the coastal waters resolves itself into the following legal maxims:

(a) Passage through coastal waters can not be refused to vessels of commerce and war of foreign States in times of peace or war, nor can it be made dependent upon payment of duties. On the other hand, excepting distress at sea, sojourn is allowed only with permission of the adjacent State (for maneuvers, soundings, etc.).

(b) Coastal trade (*cabotage maritime*) and coast fishing can be reserved for the citizens of the State to the exclusion of all foreigners.

(c) The adjacent State has the right of sea police.

It has, therefore, above all, the right of police over navigation. The regulations of the adjacent States concerning the code of signals, sea beacons, compulsory pilotage, prevention of collision of vessels, rendering help in distress, protection of underground cable, etc., are thus binding for all vessels that pass through the coastal waters. It has, furthermore, the right of customs police, and besides, the right to visit and search foreign vessels under suspicion of smuggling. It has, finally, the right of sanitary police. It is at the same time empowered to enforce the observance of instructions pertaining to its police and to punish their violation.

Page 91.—Special regulations are in force for bays and inlets. In their interior positions, governable entirely from the shores, they are private waters, and thus are subject to the unlimited sovereignty of

the adjacent State; adjacent to these portions are those waters which beyond their limits extend their waters into the open sea.

The border of the inner portion of bays and inlets is determined by drawing an imaginary straight line from headland to headland at that width of the bay where the middle point of the line can be reached by the cannons placed upon both headlands of the shore. From this line landward lies the inclosed bay, and on the other side toward the open sea the coastal waters begin.

Differing but slightly from this, Article 2 of the treaty of the North Sea States of May 6, 1882, provides in its second paragraph:

In bays the distance of three sea miles is measured from an imaginary straight line, which is drawn from one shore to the other at that point lying immediately next to the entrance of the bay, where the opening is not over ten sea miles.

Many wider claims over the bays and inlets (Kings Chambers) have been made by the English, but were not recognized by the other powers. According to these claims, all the adjacent waters which lie between the outermost headlands are appropriated sea under the absolute rule of the adjacent State.

F. MARTENS: "Le Tribunal d'Arbitrage de Paris et la Mer Territoriale,"
In *Revue Générale de Droit International Public*, volume 1, 1894.

Page 39.—In my opinion, the only actual limit of the territorial sea ought to be the range of cannon from the shore. This principle, proclaimed by Bynkershoek, ought to be recognized as the only legal and rational basis to determine the limits of the sovereignty of the adjacent State over territorial waters.

According to this point of view, the sovereignty over the territorial sea is only a prolongation from the land of the territory of a State. Within this radius of the territorial sea, limited by the greatest range of cannon, the laws and the authority of the adjacent State alone obtain. The right of fishing belongs only to the subjects of that State. The customs administration, established for the protection of the fiscal interests of the State, is exercised without limit in the territorial sea over all vessels.

Finally, the *imperium* of the adjacent State is absolute in the radius of territorial waters dominated by cannon. We must recognize, however, that the limits of the territorial sea ought to change with the modifications in the range of cannon. However, if at a certain time this range was 3 miles, the extent of territorial sea was only 3 miles.

If at present cannon carry to 12 or 15 miles, the territorial sea of modern adjacent States ought also to extend to 15 miles.

Page 43.—An agreement between the Powers with respect to the limits of the territorial sea is a condition *sine qua non* of success in establishing measures of protection in the open sea for the preservation of the legitimate interests of the nations and the rights of their subjects.

It is desirable that this agreement be arrived at soon by reason of the great interests connected with maritime fishing, which States are obliged to defend in virtue of their own sovereignty, with the concurrence of other nations.

However, up to the time when this international agreement shall have become an accomplished fact, each State has the incontestable right of declaring, as its territorial sea, the waters which it dominates by batteries from the shore. In view of the necessity of defining the range of cannon, and in view of the exigencies of maritime navigation and international commerce, the adjacent State may limit this range of cannon to a distance of a number of miles fixed by itself. Instead of the limit of 3 marine miles, the adjacent State has the incontestable right of taking 10 miles or even more.

In our opinion the limit of 10 miles is more in accord with the mean range of modern cannon, and a more efficacious protection of the interests of the adjacent population which live upon maritime fishing.

VON MARTENS: Précis du Droit des Gens Moderne de l'Europe. Vergé's second edition. Paris, 1864.

Volume 1, § 40, page 141.—What has been said about rivers and lakes (that they are the property of the State) is equally applicable to straits and gulfs; above all, to those which do not exceed the ordinary width of rivers or the double range of cannon.

Likewise, a nation may assume an exclusive right over those neighboring portions of the sea (*mare proximum*) susceptible of control from the shore. Different opinions have been expressed upon the distance to which the rights of the master of the shore extend. All nations of Europe to-day agree that the rule is that straits, gulfs, and the adjacent sea belong to the owner of the shore, at least as far as the range of a cannon placed on the shore. A number of treaties have adopted the more extended principle of 3 leagues.¹

¹ Vergé adds the following note to this section: We must distinguish between the open sea and the littoral sea, between the seas open to all and those included within the territory of one or several States. The sea can not become the object of exclusive property.

§ 41, page 144—*Adjacent seas*.—Can a nation acquire an exclusive right over rivers, straits, gulfs too wide to be covered by a cannon shot fired from the shore, or over parts of an adjacent sea which exceed the range of cannon or even the distance of 3 miles? No one doubts that such an exclusive right could be acquired against an individual State which consents to recognize it. However, it seems that this consent is not an essential requisite for such an acquisition, provided the master of the shore is in a position to maintain it by the aid of the local police or by a fleet, and that the security of his territorial possessions offers a justificatory reason for the exclusion of foreign States. If such portions of the sea are susceptible of domination, it is a question of fact to determine which of these straits, gulfs, or adjacent seas, situated in Europe, are free from domination, which are dominated and which are the object of dispute.

§ 42.—We generally recognize as free: First, the Straits of Gibraltar beyond the cannon shot; second, the Sea of Spain, the Aquitaine Sea, the North Sea, the White Sea, and the Mediterranean Sea.

We do not contest the exclusive right of Great Britain over St. Georges Channel; of the King of Denmark over the Great and Little Belt and the Sound; of the Turks over the Archipelago, the Sea of Marmora, and the straits which lead to the Black Sea; of the King of Naples over the Strait of Messina; of Holland over the Zuyder Zee; and of Sweden over the Gulf of Finland.

But the following rights of countries over certain portions of sea have been vigorously and often contested: Of the British Empire to property over the four seas which wash that island, particularly the British Channel and the Pas-de-Calais; the claim of Venice to the Adriatic Sea; the claim of Genoa to the Gulf of Genoa. Contests over the empire of the Baltic Sea have likewise been raised between the States which border it and between foreign nations and Denmark, which possesses the key to the sea. She still believes herself authorized to close the sea against hostilities in time of war.

partly because, not being capable of occupation, nobody can oppose its use. The territorial sea may become the property of a State because its possession may be continuous as if it were a river, lake, or part of the continental territory. All treaties, also, recognize that nations in the interest of navigation, fishing, and defence have the right of establishing their laws in the adjacent territorial seas, just as all publicists agree in ascribing property in the territorial seas to the adjacent State. But the extent of this privileged portion of the sea has long been debated. Older authors carry the limits of the maritime territory very far, some to sixty, others to a hundred miles. . . .

Other authors consider that the extent of the territorial sea should not be regulated uniformly, but ought to be proportioned to the importance of the adjacent State. In the midst of these contradictory opinions we must, to follow Hautefeuille, recur to the causes which have induced the exception to the liberty of the seas on the part of these adjacent waters and which have placed them under the domain of the adjacent State. [These causes are as mentioned in the extract made from Hautefeuille's work.]

The maritime domain is not measured from every point of the shore. An imaginary line is drawn from headland to headland, which is taken as the point of departure for the cannon shot. This is the case with small bays, gulfs of wide extent being assimilated to the open sea.

There are likewise outside of Europe a multitude of contests relative to adjacent seas of European possessions in Africa, India, and America. A part only have been regulated by treaty.¹ . . .

§ 153, page 399.—The property and empire of the master of the shore extend in general over all those parts of the rivers, lakes, gulfs, straits, or neighboring seas which are within the range of a cannon placed on the shore, and the rights resulting therefrom, generally designated under the collective name of *droit littoral* (*strandrecht*), include the following: First, the exclusive right of taking fish, coral, pearls, etc., and the property which the sea throws on the shore; second, the exclusive right of navigation, passage, entrance, and sojourn in the roadsteads and ports, subject to the exceptions which result from the liberty of commerce recognized in Europe to-day by virtue of legislation, treaties, or usage; third, the right of collecting customs and establishing tolls for sojourn in ports and roadsteads, for the expenses incurred in securing the safety of vessels, such as for light-houses, fortifications, coast guards, etc.; fourth, the right of exercising all rights of sovereignty comprised under the collective name of jurisdiction.

MOLLOY: *De Jure Maritimo et Navali*. London, 1744.

Book I, chapter 5, page 75.—1. After the writings of the illustrious Selden, certainly 'tis impossible to find any prince or republic or

¹ Vergé makes the following comment upon this section:

It is with reason that Pinheiro-Ferreiro reproaches our author with confusing objects that are distinct. The Sound, the Strait of Messina, and the Straits which connect the Black Sea and the Mediterranean can not be assimilated to St. Georges Channel, the Zuyder Zee, and even to the Gulf of Finland. The people situated on the shore of the former could not dispute its use to other nations. They can not be injured by the enjoyment of its use by others. On the contrary, the free navigation of these straits may be very profitable for them. But the question here is of straits or gulfs whose free use could not be accorded to foreign nations without harming the riparian peoples, which have the right to exclude foreigners who refuse to fulfill the conditions under which consent to receive them is extended. It is evident, in fact, according to the principles set forth in the preceding paragraphs that all gulfs and straits can not belong throughout all their extent to the territorial sea of the State whose coasts they wash. For gulfs and straits of wide extent, the sovereignty of the State is limited by the range of cannon shot. Beyond this these gulfs and straits are assimilated to the high seas and their use belongs to all nations. According to de Cussy (*Phases*, vol. 1, p. 97), we may mention the following as being considered belonging to the territorial sea subject to the laws and surveillance of the adjacent States. The Sea of Azor and the Sea of Marmora, the Zuyder Zee and the Dollart, the Gulfs of Bothnia and Finland, the Gulf of St. Lawrence in America, a part of the Gulf of Mexico within the respective limits fixed by the nations whose territory is bordered by that gulf, the tail of the Adriatic Sea, and a number of other European gulfs and straits. Straits or passages of sea are considered as free sea in which a ship passing through the center is beyond the range of cannon. Such are the Straits of Gibraltar, the English Channel, the Mozambique, Bering, Malacca, Davis, etc., straits, even the Sound, in spite of the navigation dues formerly established by Denmark.

Our author mentions the ancient claims of Great Britain, Venice, and Genoa to property in the seas which border or surround them. Not only have these claims been contested, but time has brought justice and the principle of the entire liberty of the seas as existing for the profit of all nations is daily making progress.

single person imbued with reason or sense that doubts the dominion of the British Sea to be entirely subject to that imperial diadem.

Page 77.—4. And as the sea is capable of protection and government, so is the same no less than the land subject to be divided amongst men, and appropriated to cities and potentates, which long since was ordained of God as a thing most natural.

NAVAL WAR COLLEGE (UNITED STATES).¹

[The United States Naval War College at Newport, R. I., was established October 6, 1884, under General Order No. 325 of the Secretary of the Navy.² Its purpose is to throw open to officers of mature years the most comprehensive course possible of professional study. It is therefore a place for the discussion of definite problems relative to naval campaigns, which discussion is participated in by officers of all ranks. Through lectures delivered by eminent specialists, instruction is given in tactics, strategy, logistics, political history, and international law. Discussions on the latter subject are based upon material furnished by naval officers and international lawyers, and the conclusions reached through this collaboration are consequently of great value and weight.]

MARGINAL SEA AND OTHER WATERS.

What regulations should be made in regard to the use in time of war of the marginal sea?

Regulations.

1. Acts of war are prohibited in neutral waters and in waters neutralized by convention.

2. "Belligerents are bound to respect the sovereign rights of neutral powers and to abstain in neutral waters from all acts which would constitute, on the part of the neutral powers, which knowingly permitted them, a nonfulfillment of their neutrality."

3. The area of maritime war:

(a) The sea outside of neutral jurisdiction.

(b) Gulfs, bays, roadsteads, ports, and other waters of the belligerents.

4. Limitations:

(a) *Marginal sea*.—The jurisdiction of an adjacent State over the marginal sea extends to 6 miles (60 to a degree of latitude) from the low-water mark.

(b) *Roadsteads*.—The jurisdiction over roadsteads is the same as over the sea.

(c) *Gulfs and bays*.—The jurisdiction of an adjacent State over the sea extends outward 6 miles from a line drawn between the oppo-

¹ *International Law Topics and Discussions*, 1913 (Washington, 1914), pp. 11, 83.

² *Annual Report of the Secretary of the Navy*, 1885, vol. 1, p. 103.

site shores of the entrance to the waters of gulfs or bays where the distance first narrows to 12 miles.

(*d*) *Straits*.—(1) Straits not more than 12 miles in width are under the jurisdiction of the adjacent States. (2) Innocent passage through straits connecting open seas is permitted.

The admission of the claim of the right to exercise jurisdiction over the marginal sea would carry the corresponding obligation to exercise this jurisdiction. There would therefore be an increase in the extent of right together with that of duty.

The proposed assumption of a jurisdiction by the United States to the Gulf Stream in the Atlantic Ocean would involve obligations which the Government would probably be reluctant to assume. The claims to 100 miles, 60 miles, 20 miles, etc., would likewise involve large obligations. It should therefore be emphasized that the possession of jurisdiction, if granted, carries obligations as well as rights.

The extension of jurisdiction in the marginal seas is a corresponding reduction of the area which has formerly been considered as the high seas, an area generally recognized by all the States of the world as being outside the limits of possible appropriation or exclusive jurisdiction. Any change from the 3-mile limit which may be regarded as properly accepted should therefore be by general agreement of the maritime States.

The rights and duties of belligerents and neutrals would be materially modified by such a change.

The exercise of jurisdiction over area beyond the 3-mile limit has been generally admitted for purpose of enforcement of revenue laws and granted by convention for fishing and other purposes. There would accordingly be little difficulty in introducing more uniformity in these practices. Several States have signified willingness to make changes in their domestic regulations.

NUGER: *Des Droits de l'État sur la Mer Territoriale.* Paris, 1887.

Page 176.—We find in old treaties the tendency to carry far out the limits of the “maritime territory”—to use an expression common at that time—owing to the terror inspired at that time by pirates and maritime excursions without declaration of war. Thus Cussy¹ says that “several treaties have formerly established the

¹ Cussy, *Phases et causes célèbres du droit maritime des nations*, 1856, vol. 1, p. 92.

limit of the sovereignty of the sea along the coasts of a nation at 15 leagues (60 kilometers); others have fixed this limit at 4 leagues (16 kilometers).” It is owing to the same fear that we see in the treaties of 1685 and 1765 between France and Morocco “that the privateers of both nations shall not be allowed to take prizes within 6 leagues from the coasts of France, and that no Moroccan ship shall be allowed to cruise within less than 30 miles from the French shore.”

As early as the end of the eighteenth century we see the principle laid down by Bynkershoek enter from theory into actual practice. We shall quote the articles of a large number of treaties where this rule is observed.

1786: *France and Great Britain (Article 41)*.—“The said majesties shall not permit, on *the shores within the range of cannon*, or in the harbors and rivers of their dominions, any ships and merchandise owned by citizens of the other nation to be taken by men of war or by any other ships provided with a license of any Power whatever, and in case it should happen both parties shall unite to repair the damages so caused.”¹

1787: *France and Russia (Article 28)*.—“The two high contracting parties bind themselves mutually, should one of them be at war with any Power whatever, to attack the ships of the enemy only *beyond the range of cannon* from its ally’s shores. They also mutually bind themselves to observe the most absolute neutrality in the harbors, ports, gulfs, and other waters known as closed waters and belonging to them respectively.”²

1787: *Two Sicilies and Russia (Article 19)*.—“The two high contracting parties, in order to avoid any cause of misunderstanding between them, and to agree also *on a definite principle of the law of nations* respecting the navigation of neutrals, have agreed that whenever one of the parties shall be at war with any other Power whatever it shall not be allowed to attack the enemy’s ships except *beyond the distance of the range of cannon* from the shores of the nation which shall have remained neutral.”³

1794. *United States of America and Great Britain (Article 25)*.—“Neither of the parties shall permit ships or property belonging to subjects or citizens of the other to be *taken within the range of cannon* from the shore nor in any bay, rivers or harbors within their territory by men of war or other ships licensed by princes, republics, or any nation whatever. In case it should happen, however, the party the territorial rights of which shall have been so violated shall endeavor to obtain by every means possible full and complete redress for the ships so taken, whether men of war or merchant ships.”⁴

¹ De Clercq, *Recueil des traités de la France*, vol. i, p. 163.

² See *ibid.*, p. 181.

³ Martens, *Recueil des traités*, vol. iv, p. 237.

⁴ *Ibid.*, vol. v, p. 685.

1795. *France and Regency of Tunis*.—"In the future the limits of immunity both for the French and Tunisian equipments and for their respective enemies, are confined to the *range of cannon* from the coasts of France and Barbary, whether there are guns on the shore or not."¹

1842. *Portugal and Great Britain (Article 3)*.—"It shall not be permitted to search or detain under any pretext or reason whatever any merchant ship anchored in any harbor or anchoring place belonging to one of the high contracting parties *within cannon shot of the land batteries, except when the authorities of the country shall ask for assistance by writing.*"²

We have seen hitherto³ that instead of expressing the extent of territorial sea according to a definite measure determined by figures, several old treaties merely adopted the range of cannon. In the treaties quoted hereafter, on the contrary, there is only mentioned a fixed measure of 3 miles. It is to be observed, however, that the treaties where the measure of 3 miles is mentioned are all relative to fishing. This remark is important, as we shall deduce from it certain consequences.

First let us enumerate the principal treaties:

October 20, 1818: *United States of America and Great Britain (Article 1)*.— . . . The United States by the present article renounces forever the privilege enjoyed or claimed to this day by their inhabitants of capturing, drying, and curing fish on the coasts, bays, creeks, or harbors of His Britannic Majesty's dominions in America not included within the limits above mentioned, nor at a *distance of three miles* from said coasts, provided that the American fishermen be allowed to enter said bays and harbors for shelter, repair, etc."⁴

August 2, 1839: *France and Great Britain (Article 9)*.—"The subjects of His Majesty the King of the French shall enjoy the ex-

¹ De Clercq, *Recueil*, vol. 1, p. 244.

² Martens, *Nouveau recueil*, vol. III, p. 251.

³ We can mention more old regulations where the range of cannon is adopted as limit to the territorial sea.

Regulation of the Grand Duchy of Tuscany, August 1, 1778, Article 1: "No prize shall be taken in the seas adjacent the ports of Tuscany, nor shall any hostilities be carried on in the space within the range of cannon."

Edict of the Republic of Venice, dated July 1, 1779, Article 1: "No hostilities shall be carried on between the belligerent Powers in the harbors, roadsteads, and shores of our dominions in the distance within the range of cannon."

Edict of the Republic of Venice of September 9, 1779: "No act of hostility shall be tolerated in the harbors, roadsteads, and shores of our dominions except beyond the range of cannon."

Russian regulation of December, 1787, on privateering, Article 2: "Russian ship-owners shall pursue, attack, take, or destroy wherever there shall be an opportunity to do so, the men of war and merchant ships of the enemy, except when the hostile ship, in looking for shelter, shall place itself within the range of cannon of a harbor or the shores of a neutral Power. They shall not indulge in any act of hostility in the harbors and roadsteads belonging to neutral powers until the enemy is beyond the range of cannon."

⁴ Martens, *Recueil*, vol. IV, p. 571.

clusive right of fishing *within a radius of three miles*, reckoning from low-water mark, along the whole length of the French coasts; and the subjects of Her Britannic Majesty shall enjoy the exclusive right of fishing *within a radius of three miles*, reckoning from low-water mark along the whole length of the coasts of Great Britain. . . . It is also understood that the radius of 3 miles fixing the general limit for the exclusive right of fishing on the coasts of both countries shall be measured for the bays of no more than 10 miles width from a straight line drawn from headland to headland. . . . (*Article 10*).—It is agreed that the miles spoken of in this convention are geographical miles of 60 to a degree of latitude.”¹

Similar provisions have been adopted in the convention of May 6, 1882, important to quote, as many nations signed it. Article 2 is as follows: “National fishermen shall enjoy the exclusive right of fishing *within a radius* of 3 miles, reckoning from low-water mark, along the whole length of the coasts of their respective countries, as well as of the dependent islands and banks. For the bays the radius of 3 miles shall be measured from a straight line drawn across the bay, in the part nearest to the entrance, at the first place where the opening shall not exceed 10 miles. The present article does not affect in any way the free navigation of fishing boats navigating or anchoring in territorial waters, provided that they conform to the special police regulations of bordering Powers.”²

V. We shall quote further treaties and regulations where this distance of 3 miles is adopted as the limit of the territorial sea, at least in regard to the enjoyment of the right of fishing; but we shall quote these when we treat of coast fishing. We are satisfied to have shown that the fixed measure of 3 miles is common to all nations, and has a tendency to be more generally adopted every day. We do not believe, however, that it has come to such a common practice as to serve in the future as a basis in international treaties. Indeed, all the conventions above quoted which adopted this limit of 3 miles all relate solely to home fishing. Now one will readily understand that a nation may limit the exercise of *one* of its granted rights over the territorial sea; one may even hold readily, as we shall further see, that it must be so in regard to fishing, but it does not necessarily follow that a nation must also limit the exercise of its other rights to the same extent.

We insist on this point because many writers hold—an opinion quite general—that the distance of 3 miles is a fixed and rigid rule. They claim that 3 miles was *originally* the range of cannon and that, although there was no express international agreement on the subject, this distance has come in continuous practice to be accepted as a rule

¹ See de Clercq, vol. iv, p. 497.

² *Ibid.*, vol. xiv, p. 7.

from which one can not swerve. In other words, by a sort of tacit agreement, "the range of cannon has been fixed at 3 miles, so far as international maritime law is concerned." That is what Calvo¹ says very explicitly: "From an international point of view this limit of 3 miles must stand as a fixed rule one must observe and respect in all cases where treaties do not stipulate to the contrary." Others are not so explicit and seem merely to identify the range of cannon and the distance of 3 miles, without explaining the relation existing between both terms. In that connection one may quote several English and American publicists,² and more particularly Wheaton: "The general custom of nations has added to this extent of the maritime jurisdiction of a nation portions of the sea adjacent to the coasts to a distance of one sea league *or* as far as a gun shot from the shore will reach. This distance, since the adoption of fire arms *has generally been considered to be 3 miles.*"

When the Territorial Waters Jurisdiction Act of 1878 was presented to the English Parliament, the extent to assign to the territorial sea was not discussed, and the declaration of the Government establishing its limit "within the range of cannon *or* 3 miles" did not meet with any opposition.

The truth is that this identification, correct at one time when the range of cannon did not exceed 3 miles, is to-day nonsense. This distance has been sanctioned in certain treaties relating to special questions and having quite a distinct object. But it is evident that these can only be effective so far as the point the parties have in view is concerned. For the rest it is necessary to refer to principles. One should not argue from the particular to the general. This is, however, what the writers who made the mistake we just spoke of have done, for, as Perels³ says, it is "by a series of generalizations bearing on acts and writings by which *certain special questions* were determined" that they came to identify the range of cannon and the distance of 3 miles.

Ortolan⁴ has not made this mistake. He shows very plainly the distinction existing between the rational and conventional measure. "The longest range of cannon," he says, "is the common measure, that of the universal law of nations, and it must be observed by all in the absence of any treaty. Nothing prevents, however, certain Powers from fixing between themselves and by treaties another extent to the territorial sea. But the extent so established could only be binding for the contracting parties, the other Powers remaining under common law."

¹ Calvo, *Dr. internat. théor. et prat.*, sect. 244.

² In that connection, Phillimore, 1, sect. 198; Wheaton (4th ed.), vol. 1, p. 168.

³ Perels, *Dr. marit. intern.*, transl. by Arendt, p. 30.

⁴ Ortolan, *Diplom. de la mer*, vol. 1, p. 159.

The majority of German writers make the same distinction. Bluntschli, after saying¹ "that the territorial sea extends within the range of cannon from the shore," adds: "International treaties or the laws of nations may establish other more precise limits, such as one geographical mile or three English miles from the shore at low water." Gessner² states that "the rights of riparians have increased since the invention of rifled guns."

It is not even absolutely true to say that the distance of 3 miles has definitively been adopted in practice, except, of course, in relation to fishing. Thus, in the treaty of July 3, 1842, between Portugal and Great Britain (Article 3) for the abolition of slave traffic, the measure adopted is that of the range of cannon. What goes to prove it are the words pronounced by Baron von Haan, delegate from Austria-Hungary to the conference for the free use of the Suez Canal. This is what he said before other diplomats without being contradicted by them: "Territorial waters are in most treaties considered as extending to one sea league from low-water mark. *As this distance does not correspond any longer to the range of cannon, a new system characterizes as littoral seas those that are defensible from the coast.*"³

VI. We still have to give our opinion on a question raised by Mr. Seward, Secretary of State of the United States of America, in a note, dated October 16, 1864, proposing that an international agreement be concluded on the three following points: First. Should the jurisdiction of the bordering State be extended from 3 to 5 miles? Second. In supposing that the shots fired from men-of-war must not reach the neutralized strip of sea any more than the neutral ground, should not these ships refrain from firing from a distance of less than 8 miles from the coasts, the distance of 3 miles even admitted? Third. Would it not be advisable to adopt a limit determined by figures rather than depending entirely for this limit upon the range of the cannon?

The first and third propositions, the only ones of interest to us for the present, we may sum up as follows: Would it not be better to adopt a fixed measure rather than depend for this measure upon the range of the cannon?

We think that it would hardly be desirable. What is more, we believe its adoption would not bring any good results. For, in the event of the adoption of a measure determined by figures, this measure after a short time would not be in keeping with the range of

¹ Bluntschli, *Dr. internat. cod.*, article 302.

² Gessner, *Le droit des neutres sur mer*, p. 28.

³ Among writers who do not admit the identification of the range of cannon with the distance of 3 miles, we shall mention: Martens (2d ed.), vol. 1, p. 144 *et seq.*; Klüber, sect. 130; Heffter, sect. 75; Schiatarella, *Del territorio*; Field, *Projet de code internat.*, sect. 28; Hall, *International Law*, p. 127.

cannon always increasing with the progress of ballistics. This would not present any great inconveniences as to the exercise of certain rights by the bordering State, but certainly would present some very serious consequences as to the organization of the defense and safety of coasts, as also to the neutrality belligerents must observe within the waters of a neutral Power. How could one venture to decide that it is not permissible for a bordering State, in order to insure the defense and safety of its territory, to take all measures necessary to attain that end within the limits where it may be attacked; that is to say, within the range of cannon from the shore? It would, therefore, be necessary to admit that in some respects the neighboring sea within the range of cannon is not free, but subjected to the bordering State, and that is in fact what the territorial sea is. Hence, this system would have for result to simply restrict, by common consent, the exercise of some of the rights of the bordering State to an extent determined by a fixed distance. But one may attain this end more easily and better through special treaties where the exercise of one or several of the border's rights can be regulated, taking into account certain circumstances of fact which we can not study here, or in case divergent rights would conflict as sometimes happens in cases relating to fishing.¹

In finishing this chapter, and to sum up the doctrine we have sustained, we shall state the following propositions:

First. The longest range of cannon according to the progress of ballistics at each period is the *common measure*, the only rational one; it is that of the universal law of nations, which must be observed in the absence of treaty;

Second. An international agreement for the adoption of a fixed and invariable distance under a definite standard is not desirable;

Third. It is desirable, however, that the exercise of certain rights of the State be regulated by treaties, as for instance fishing, the control and supervision of customs, etc.

Pages 190-195—Ports, harbors, roadsteads, and small bays.—We have spoken thus far only of the territorial sea proper, but certain parts of the sea closer to land and "partaking so to speak of its condition," must be considered in a different light. We have tried to show that the territorial sea is not of a nature to be owned, while we think, on the contrary, that the indentations of small extent formed by encroachment of the sea into the land and known as ports,

¹ What needs regulating in treaties is more especially the police of customs. For, as we shall see as we come to the subject, it is especially in regard to the customs limits that the legislations of various countries conflict most. France has adopted the distance of 2 myriameters; Great Britain and the United States, 4 leagues (12 miles); Spain, 6 miles (11 kilom. 112).

harbors, roadsteads, and small bays may be possessed by the bordering State: that in fact they constitute parts of its sovereign domain, as there is no material or moral hindrance to the right of ownership over them.

That the State owns them absolutely and permanently and may at will preserve them from any foreign interference is beyond doubt. But, in order to enjoy all the advantages resulting from its favorable situation, it is necessary for said State to exercise this unlimited authority it actually enjoys over these parts of the sea. Moreover, nothing prevents the exercise of this power, since, as Ortolan says:¹

The ownership of a nation over the ports and roadsteads of its territory does not prevent other nations from navigating freely and having intercourse with one another.

Massé, following Hübner, gives a simple reason for deciding that ports and roadsteads are as much under the authority of a nation as its territory is. "Roadsteads and bays," he says, "are safe anchoring places only because the adjacent shores stop currents and waves and shelter ships from violent winds, so that vessels anchoring there are under the protection of said shores, and they can not deny his sovereignty, since they place themselves under his authority."

It thus follows that a nation may forbid entrance to its ports, roadsteads, and bays, since it has absolute authority over them and may also subject foreign ships to such dues as it may wish to collect. To do so is merely to exercise the right of ownership. But let us say, however, that, although an absolute right, it is in fact seldom resorted to, for, aside from the measures of retorsion likely to result, it is obvious that such a prohibition would be harmful to its commercial, industrial, and other interests.

Small indentations of the sea into land are universally considered by writers parts of the territory proper.

"Ports and harbors," says Vattel,² "are evidently a dependency and a part of a country and consequently properly belong to the nation. One may apply to them, so far as the effects of domain and empire are concerned, all that is said of land proper."

Fiore, in his new treatise on public international law,³ finds that "so far as ports and roadsteads are concerned, it is evident they must be considered as forming part of the exclusive domain of the territorial sovereign."

¹ Ortolan, *Diplom. de la mer*, vol. 1, p. 140.

² Vattel, *Dr. des gens*, liv. 1, ch. xxiii, sec. 290.

³ Fiore, *Nouveau dr. internat. publ.*, sec. 814 (transl. by Antoine, 1885). Fiore in the same section goes too far, we think, in asserting that "according to the international law of civilized nations, it is unlawful to refuse to foreign nations the harmless use of ports and roadsteads for the necessities of trade." We admitted on the contrary that, so far as principles and strict right are concerned, any State has a right to close its ports to foreign ships.

Perels¹ believes that "ports, roadsteads, bays, and mouths of rivers, whatever their configuration and extent may be, are to be considered as appropriated waters of the State to which they belong."

One finds in the laws of most countries a disposition to consider ports and roadsteads as dependencies of the public domain. Article 538 of our Civil Code is formal in that regard, and according to the general code of Prussia (11, 15, sec. 80) ports are the property of the State.

In short, we may say that ports, roadsteads, and more generally "those portions of the ocean close to continental territory where ships, either by nature or artificially, are more or less sheltered from storms and in which one may prohibit entrance and sojourn," are as well a dependence of the State as its territory proper. That is why they are known under the general name of *maritime territory*. One must say, however, that many writers—more particularly those who admit the right of ownership of a nation over the territorial sea—comprise in the expression "maritime territory" even the adjacent sea within the range of cannon. As for us, we shall only use that term when we speak of the encroachments of small extent of sea upon land.

Pages 196-205—Wide bays and gulfs.—We have spoken thus far only of the encroachments of small extent of the sea upon the land, but what shall we have to say about those wide enough to be called wide bays and even gulfs? Shall we include them within the maritime territory of the bordering State or apply to them the system of the territorial sea?

As for us, we believe that gulfs, when they do not extend beyond twice the range of cannon, calculating from the extreme points of the land, are parts of the territorial sea, but not of what we have called maritime territory.

One may rightly claim that the bordering State owns them, that they are permanently and continually in its power; no doubt; but it is also true that there is always a moral bar to regard these large encroachments of the sea upon land as belonging to said State. Indeed, one can not lay claim to the exclusive use—and consequently to the property—of a thing when this exclusive use is not necessary for deriving from it the profits one may reasonably expect. Now, the rights we admitted a State to enjoy over the territorial sea—police, jurisdictional, and defensive rights—are quite adequate to protect the rights of said State over that part of the sea. It would be unjust for the bordering nation to *absolutely appropriate* wide bays and gulfs which its guns may command, as to do so would deprive other nations of a common advantage and on the other hand the granting to said nation of the same rights as over the territorial sea would be sufficient to preserve all its interests.

¹ Perels, *Dr. marit. internat.*, p. 42.

It must be said that writers, as a rule, favor the opposite opinion. Thus Ortolan,¹ whom we can not, however, reproach with overstating the rights of the bordering Power, states that "one must place in the same category with roadsteads and ports, gulfs, bays, and all encroachments known under other names, when said encroachments formed by the land of the same State do not exceed in width the double range of cannon, or when their entrance can be controlled by cannon shot, or is naturally protected by islands, banks, or rocks. In all the above cases, in fact, it may be said truly that said gulfs and bays belong to the State the territory of which surrounds them. This State owns them and all the arguments concerning ports and roadsteads may be repeated here."

We shall at first reserve our opinion as to the case, seemingly foreseen by Ortolan, of islands at the entrance of a gulf; in this case, as they may be considered as forming part of the territory and as being, so to speak, detached portions of the mainland, one may consider the gulf as an inland lake and the territorial sea only begins from the shore of said islands. But when there is in question a gulf having a width of twice the range of cannon, we do not believe the State can have any genuine right of property over it. Certainly we agree with Ortolan in conceding that it may enjoy its possession. Is this a reason, however, in favor of ownership? A State may possess the strip of sea which stretches along the coasts within the range of cannon and still, as admitted by Ortolan himself, not enjoy an absolute right of property over it. It is a moral obstacle which, as we have said before, prevents appropriation in both cases. Finally, let us take into consideration the fact that, in Ortolan's time and in that of the talented writers who before him taught the same doctrine, cannons had not so wide a range as to-day. Some coast guns nowadays reach as far as 9 and 10 miles; shall it be then necessary to decide that gulfs 20 miles wide belong to a nation as ports do? There is in that an obvious exaggeration, even more—a danger. For, considering the continual progress of ballistics, one may think that applying such a doctrine would result in the confiscation of large portions of the sea and would be very detrimental to the interests of navigation. This is not, as some may say, an imaginary danger, for a nation would never prohibit entrance to its gulfs any more than it would to its ports; but the danger exists if the nation has the power to enforce this prohibition and if that power is admitted.

Therefore, it seems proper to us in principle and only practical in fact for a nation to have over wide bays and gulfs the same rights only as over the territorial sea. But, under those circumstances, that is to say in granting to a nation only certain rights of police and jurisdiction, will it not be necessary to extend beyond the rational

¹ Ortolan, *Diplom. de la mer*, vol. 1, p. 145.

limit the space subjected to its power? In other words, shall one not consider as forming part of the territorial sea the gulfs of wide extent, especially those the width of which exceeds the double range of cannon?

This has been held, it being pretended that the public order and the safety of the bordering State required it. It was said that in a naval war it would be excessive for the belligerent Powers to fight in a gulf and therefore create a disturbance in waters much frequented by the subjects of the bordering nation. Besides, it was said, it is necessary for the defense and security of coasts for a nation to own these portions of the sea. Finally, it was further said, that the configuration of these large recesses of the sea into land affords a natural reason for accepting that view.

Such is the pretension of England, claiming a right of sovereignty over the encroachments of the sea into the land, of whatever extent; so that it would have jurisdictional power over all the waters included within a line drawn from headland to headland. These parts of the sea have, among English writers, the characteristic name of *King's Chambers*.

The United States Government lays similar claims over the wide bays of the coasts of North America, as for example, over Delaware Bay. An American writer, Kent, holds that any and all extent of the sea within two headlands ought to be subjected to the United States, among which he includes that part of the Gulf of Mexico limited by a line of demarcation drawn from the southern extremity of Florida to the mouth of the Mississippi River. The sovereignty of the United States would thus extend to more than 80 miles from the coast.

Heffter¹ states that the Gulf of Bothnia was formerly considered as exclusively belonging to Sweden and, according to the same authority, it would still be owned jointly by Sweden and Russia following the cession of Finland to Russia by the treaty of Friedrichsham (September 5-17, 1809).

These claims can not be sustained, for there really is no plausible reason for so modifying the principle of the liberty of the seas. The safety of a nation does not require the appropriation of such wide extents of water. It is certainly important "for a bay, whose entrance is defensible, to be subjected to the laws of the sovereign, as the nation would much more likely suffer an insult there than on coasts open to the winds and the violence of the waves."² As to gulfs of wider extent, that is to say, as to those whose entrance can not be defended—and to-day with the progress of artillery this would mean a width of more than 20 miles—the defense and safety of a terri-

¹ Heffter, *Dr. internat. de l'Europe* (4th ed.), sec. 76.

² Vattel, *Le droit des gens*, liv. 1, ch. xxiii, sec. 291.

tory are sufficiently provided for through the rights recognized on the part of a nation within the range of cannon.

Some English writers, as well as the American, Wheaton,¹ hold that the jurisdiction of the English crown must be recognized, because it is sanctioned "by immemorial usage." The answer to this is that such an exclusive right is too prejudicial to the principle of the liberty of seas and can never be acquired by appropriation.

According to Perels, the result of the act of 1878 on the jurisdiction of the territorial sea, which we shall study at length later, is the abandonment by England of such claims. "It is worthy of notice," he says,² "that the territorial waters jurisdiction act of 1878 limits to the distance of 3 miles the extent of the right of jurisdiction over the territorial sea. The explanations offered on that point in the discussion of the bill in the House of Lords go to prove that the English Government did not think it wise to oppose modern ideas respecting the liberty of the sea by claiming a right of jurisdiction in so large a measure." We do not believe the act of 1878 had such an important bearing with our neighbors, and as a proof in support of it, let us consider the preamble of the law, which is as follows: "Whereas the legitimate jurisdiction of Her Majesty, of her heirs and successors *extends and has always extended over the high sea adjoining the coasts of the United Kingdom and all other possessions of Her Majesty to the distance necessary for the safety and protection of said possessions.*"

We now have to see how the question has been decided in treaties.

For the first time, in the convention concluded in Paris on August 2, 1839 (Article 9), between France and Great Britain for the delimitation of fisheries on the respective coasts of both countries, it is stipulated that "bays, whose head does not exceed 10 miles, reckoning from the extreme points of the land," are dependencies of the bordering State as to the exclusive right of fishing. This measure has since that time been adopted in the conventions and regulations of various nations, at least as far as the authorization of fishing in national waters is concerned.

The most interesting document on that subject, not only because of its recent date but because it was signed by several Powers, is the international Hague convention of May 6, 1882, for the regulation of fishing in the North Sea outside territorial waters. Article 2 says that ". . . as to bays, the radius of 3 miles shall be calculated from a straight line drawn across the bay in the part nearest to the entrance at the first point where *the width shall not exceed 10 miles.*"³

¹ Wheaton, *Elém. de dr. internat.*, vol. 1, p. 170 (4th ed.).

² Perels, *Dr. marit. internat.*, transl. by Arendt, p. 46.

³ The French negotiators asked that the limit of 3 miles be admitted, reckoning from low-water mark, without regard to the configuration of the coasts. (See the report presented to the Senate by Mr. Huguet on Feb. 1, 1883, on the bill approving the Hague convention [of May 6, 1882].)

So it is in the countries where the privilege of fishing is reserved to home fishermen and where the latter enjoy an exclusive right within bays less than 10 miles wide. This right is recognized without contestation by other nations, as we see in a notice from the British Board of Trade dated November. 1868, granting to German fishermen the exclusive privilege of fishing "within the bays and curvatures of the coast having a width of 10 miles at most, calculating from the extremities of firm land and sand banks." Finally, let us say that a stipulation similar to that of Article 9 of the convention of August 2, 1839, and to that of Article 2 of the Hague convention, has been inserted in Article 1 of the bill passed by the Senate on November 24, 1885, setting apart the privilege of fishing within French territorial waters. The bays where fishing is reserved to citizens are less than 10 miles wide.

This seems a point pretty well established in international practice, at least so far as the exclusive privilege of fishing is concerned. But our opinion is that a nation may exercise the other rights accorded to it within the limit of the territorial sea¹ over gulfs the width of which considerably exceeds 10 miles, reckoning from the extremities of land. For, as we have said above, the rule is that a nation may comprise within its territorial sea, but not within what we called its maritime territory, wide bays and gulfs whose width does not exceed twice the range of cannon. Now, some coast guns may reach a distance of between 9 to 10 miles. Consequently, the bordering State would have under its rule all the indentations of the sea into land the width of which is less than 20 miles.

Page 215—Coastal fishing.—Maritime fishing is that which is conducted in the sea or on the coasts and beaches of the sea or in the rivers up to the point where they cease to be salt.

Maritime fishing can be divided into large categories—great fishing, such as is conducted in the open sea, and small fishing, conducted along the coasts. We shall only treat of coastal fishing, which is the only kind of importance in the open sea.

The exclusive right of fishing along the coast has always been one of the rights of which the States have shown themselves most jealous; we shall see that at times their pretensions have been exorbitant. It is, moreover, incontestable, and, we may add, uncontested, that the State from this point of view has a special right over the neighboring sea.

It will easily be granted that in a well-understood sense it is necessary to regulate coastal fishing. If there were no regulations or maritime police a mass of submarine products would disappear rap-

¹ We may even admit, as we shall see in the following chapter, that a nation can not extend the exclusive privilege of fishing for the benefit of its citizens beyond the limits generally admitted in the matter, without being obliged to decide that the exercise of its other rights over the territorial sea must be restricted in the same measure.

idly and the destruction of certain kinds of fish would soon result, caused by improvidence and, above all, by the avidity of the fishermen. This danger does not exist, properly speaking, with regard to fishing in the open sea, but becomes prominent along the coast. In the marine herbs fish deposit their spawn; near the coasts are oyster beds and sea shells; near the coasts, moreover, skillful divers may seek the wealth of the bottom of the ocean, such as pearls and corals. There is, therefore, an absolute necessity, even from the general point of view, of regulating and policing coastal fishing. Now, who could exercise this right if not the adjacent State? It alone can pass appropriate measures and take necessary precautions for their observance. But because a State has the right of regulating coastal fishing and enforcing the regulation, ought it to reserve the benefits of it to its nationals alone? Surely not. Moreover, we must bring other reasons to the support of the exclusive right of the bordering populations. Undoubtedly we may maintain that, since we recognize in the State the right of legislation and police, it is natural to allow it the initiative in instituting appropriate measures, and that it may thus exclude foreigners if it deems it necessary. But this, in our opinion, would be to extend too far the consequences of the simple right of police. We must find the basis of this right elsewhere.

In our opinion this basis is to be found in this fact: the people providing themselves with food according to the means nature has provided for them, the coastal populations have the legitimate right to count upon the resources, and even the wealth, which is at their disposal near the coast, and that it would be very unjust to deprive them of it, even in part, by the admission of foreigners. This is what Pufendorf formerly well perceived when he said:

If it were permitted to all peoples to fish along the coasts of a country, this would to some extent diminish the fish and the profits and benefits of the inhabitants, the more, so as there are certain kinds of fish or precious things, such as pearls, corals, and amber, which occur only in one place of the sea, sometimes of very small extent. Why could not the inhabitants of a coast, therefore, take advantage of the fecundity of rare products of the neighboring sea to the exclusion of others? Certainly there is no more reason to be annoyed at or envy such an advantage to those who seek to enjoy it alone, than there is to complain that these products do not grow in all countries.¹

To the peremptory reasons which we have just adduced in favor of this exclusive privilege, other considerations of fact must be added, which serve to demonstrate that the adjacent State has interests of a primary order to reserve fishing in the adjacent sea. It is this fishing, moreover, which stands as the refuge for the majority

¹ *Droit de la nat. et des gens*, transl. by Barbeyrac, liv. iv, chap. v, sec. 7.

of sailors whom age and infirmity place beyond sea navigation. It permits them to work and to raise their families. It serves, moreover, as an apprenticeship for the children and this same apprenticeship serves to make robust sailors out of them. It is the school of navigation and the actual nursery of the sailor. It is among fishermen that our men-of-war are recruited and it is less the momentary sojourn aboard warships which produces excellent sailors than the constant use of the sea and its dangers. From another point of view, moreover, the State is interested in reserving this industry to its nationals for the purpose of public-food supply. . . .

This exclusive right of fishing, moreover, is generally recognized by the older and modern publicists. We could make long citations, but shall content ourselves with Grotius (liv. ii, ch. ii, sec. 5), Valin (liv. 5, tit. 1, vol. 2, p. 689), Vattel (chap. xxiii, 287), de Cussy (par. 52), Hautefeuille (vol. 1, p. 233), Heffter (par. 75), Ortolan (chap. viii, t. 1, p. 160), Bluntschli (Article 310), and Perels (p. 48).

In fact this right has always been recognized in favor of riparian States. It has only been seriously contested when the exorbitant pretensions of some States were under discussion. It will be necessary to make a summary mention of these claims to show how the right of fishing, which was first considered a consequence of the empire of the sea, has been since regarded as a result of the rights of the State over the territorial sea.

In 1432 Eric, King of Denmark and Norway, declared that it had never been permitted to anybody to fish in Norwegian waters without a special permit. The sea which surrounds Iceland was under discussion, in which the fishing of whales was particularly fruitful. The privilege of fishing there was subsequently specially accorded to English subjects by several treaties, which were at times observed and at other times proclaimed null. It follows from several treaties that the domination of the Kings of Denmark over the seas which surround Iceland and Greenland was recognized, even at that epoch. We see that this was rather a consequence of the theory that certain seas belong in property to a nation than as a consequence of the doctrine taught to-day that to a certain distance from coast fishing is reserved to the riparian State. It was under the influence of these ideas that Selden defended, with more cleverness and erudition than reason, the claims of Charles I, King of England, to prevent the Dutch from carrying on the herring fisheries in the North Sea. He even sent a great fleet in 1636 to drive them from the places where this was being conducted if they did not secure a special authorization from him, at the same time paying a tribute.

These pretensions, as we have remarked above, were the consequence of the theory of the empire of the seas, and gradually disappeared as the principle of the liberty of the seas was recognized.

Thus, from the end of the seventeenth century arises the idea that fishing can only be reserved within the most narrow limits; that is, within the extent of the territorial sea only. Denmark, which made such exaggerated claims in the sixteenth and seventeenth centuries, no longer in the eighteenth century seeks to exercise the exclusive right over the Faroe Islands and Greenland. This may be gathered from the Danish Ordinances of April 25 and May 30, 1691; May 3, 1733 and April 1, 1776. It is even remarkable that Great Britain and Holland no longer at that time disputed this right in principle. They merely claimed to have acquired, by virtue of old treaties, the privilege of fishing whales in these limits. In 1740 seven Dutch ships were captured by a war vessel of Denmark for having carried on fishing within the limits of the territorial sea. Six of these vessels (the seventh escaped) were brought to Copenhagen, and in spite of the vigorous claims of the States-General, the ships and cargoes were sold for the benefit of the public treasury of Denmark.

Since the commencement of this century no State claims to exercise the exclusive right of fishing except in the extent of the territorial sea. (The author then cites, by way of exception, the ukase of Alexander I over the Bering Sea, which claims were abandoned on the request of the United States and Great Britain.)

Page 269.—The power and the right of the adjacent State to exercise police rights in the territorial waters is absolute in ports or roadsteads, but, on the contrary, is restricted to certain purposes within the extent of the territorial sea, properly so called.

Ports, harbors, and roadsteads being part of the national public domain, it follows that the State can exercise there the absolute police power. It may, at its pleasure, permit or forbid access, subject imports to certain fiscal laws or give them free entry, and subject foreign vessels to such rights and regulations as it pleases it to establish—for example, to pass laws and regulations with reference to the entrance of vessels into the port, their sojourn and movements in the basin, and their loading and unloading, and the security and safety of merchandise. The local authorities can take such measures as seem appropriate to them in the matter of precautions against fire and overheating, ballasting and unballasting, and refitting of vessels. The local government can subject entering vessels to pay certain navigation dues, such as tonnage and quay dues (representing the indemnity of the expenses occasioned to the State for the repair and maintenance of the wharves), pilotage dues, etc. On all these points States are absolutely masters of their judgment. This is the logical conclusion of the right of sovereignty and property.

Within the enumeration that we have just made we said that a State had the right of opening and closing its ports, or passing laws and regulations regarding the payment of dues, and the imposing of

moderate tariffs. Certainly that is its absolute right and is merely the exclusive right which every proprietor has. But we must add that it is rarely exercised, for the well-understood interest of peoples are opposed to the use of their rights in such a manner. It is the constant rule to-day that States ought not without serious reason refuse to aliens the innocent use of their ports for the requirements of commerce and navigation. Likewise we much recognize that the needs which all people experience and the necessity of commerce impose broad views upon States. They must not, therefore, be required to pay too high duties. It would also be difficult to suppose that a State would close its ports and roadsteads to a particular nation, for it would give to the nation thus excluded a just ground for complaint and it would expose itself to measures of retorsion. Thus, a State has the most absolute rights in its ports and roadsteads. It may exercise police power there as it finds necessary. Its power in this respect is not limited by the contrary rights of foreign nations, but only by its own interest.

On the other hand, in the territorial sea properly so called, the adjacent State has a much narrower police power. Let us recall that it has not over the adjacent sea the dominion which it certainly has over its ports. It has only the rights that are recognized as necessary to it, for the defense of its territory, for the security of its inhabitants and the protection of its commercial and fiscal interests. It can only exercise its police power with relation to these rights. It consequently has:

1. The right of taking all the measures of police necessary to safeguard the security of its coasts;
2. The right of taking necessary sanitary measures;
3. The right of exercising a customs surveillance;
4. The right of exercising a police of navigation, and taking measures either in the interest of navigation or with the object of protecting its lighthouses, lightships, and submarine cables.

Page 277.—Thus, a State has the right of taking all measures of safety which it finds necessary in its ports and in its roadsteads, and it must be added that it alone is the judge of its necessity. If it abuses its right no one can complain of its exercise of the right of property and absolute sovereignty which it has over its ports. Is the same true of the territorial sea? We think not. We think that it can only take the measures recognized as necessary for its security and the defense of its territory, but not use, or rather abuse, them at its pleasure. Thus, we saw that a State had the strict right of closing its ports to foreign war vessels at its pleasure. This does not hold true with reference to the territorial sea. It can not forbid access to it. It can not, except for grave and pressing reasons, forbid the innocent passage, even of ships of war. In case of anchorage or

sojourn, it may demand explanations. It would not even exceed its right if it demanded the departure of these vessels from the territorial sea under the condition, naturally, of assuming responsibility for all acts which, according to circumstances, might lose their defensive character in assuming an attitude of offense, and would thus constitute a legitimate cause of war.

The State then exercises an actual right of police over the territorial sea; it alone therefore has the duty of protecting the interests of the country and international interests within these territorial seas. However, there may be a case where an exception to this rule may be presented. There is a question as to whether a pirate vessel may be pursued in foreign territorial waters. The suppression of piracy is of such vital importance to all States that we believe that the adjacent State could in bad grace only complain of an act of this kind. Such is the opinion of Perels. . . . We believe that we can add that if a pirate ship is taken in territorial waters the capturing war vessel ought to bring it into the nearest port, for it is natural that jurisdiction be reserved to the adjacent State.

Page 287.—On the land frontiers the customs surveillance is much more easily exercised than on the maritime frontiers. In fact near the coasts and within a certain radius of sea, contraband and fraudulent commerce may be exercised on a large scale. The State ought to watch every port in defense of its fiscal and commercial interests. A State can not be obliged to tolerate that the waters which surround it, at least within the range of cannon shot, serve as a field for contraband operations and illicit transportations of merchandise. As far, therefore, as its power over the waters which wash its coasts extend, it has the right of effectively exercising its surveillance and consequently may provide all measures which seem to it appropriate to the purpose. The custom regulations in force in the different countries almost all contain the same provisions—the police of ships, the visiting and detention of vessels suspected of contraband and smuggling, the capture and confiscation of prohibited articles, and finally, the punishment of infractions by fine and often by imprisonment.

As to the radius within which these rules must be observed, we may say that it is much wider than that of the territorial sea. In France it is 2 myriameters, or, as was fixed by the law of August 22, 1791, 12 miles. The law, 4 Germinal, year 2, carried it to 4 leagues, and to bring it in accord with the new system of measuring, the law of March 27, 1817, fixed the customs radius at 2 myriameters, slightly more than 4 leagues.

In Great Britain the law of August 28, 1833, provides that foreign merchant vessels found within a limit of 4 leagues of the coast, either at anchor or sailing and not steering toward a port or toward

their destination when the weather permits, must leave in 48 hours on order. If they are loaded with prohibited cargo and they do not obey the order, they are confiscated.

In Spain the customs surveillance may be exercised up to 6 miles according to Article 15 of the Royal Decree of May 3, 1830, which has been renewed in the Royal Decree of June 20, 1852.

The limits which we have just indicated may be justified to-day, since certain coast cannons have a considerable range, which may reach 9 or 10 miles. But was it free from criticism in the time in which it was fixed? We think not, and conclude that such provisions of law had their origin in the special interest of each State, without taking account of the general principles of the law of nations by virtue of which no nation can exercise a right of arrest of foreign vessels beyond the normal limit; that is, beyond the range of cannon. It is a matter for each State whose flag has had to suffer under the execution of this measure to decide whether there is a ground for making a claim. It is, then, incorrect to say, as certain authors have done, that each State may at its pleasure fix the customs line. What these authors could have said is that as a matter of fact every State has decreed a customs radius more extended than that of the territorial sea, and that, nevertheless, difficulties have never arisen on the subject, but this has been for the very simple reason that each State had an interest in recognizing the delimitations of its neighbors in order to secure an admission of its own. In short, we may conclude that there has been a tacit agreement among the States that they could unilaterally and without treaty extend the maritime frontiers beyond the limit of the territorial seas in the matter of surveillance and the control of customs.

Page 344.—We saw in the first section what the jurisdiction of the State over its ports and roadsteads consisted of. We now treat of the same question with respect to the adjacent sea.

We resolve the question of jurisdiction in the matter of the maritime territory by recognizing in the State a right of jurisdiction. We only showed how the exercise of this right ought to be held in check as to war vessels by the sovereignty of the State of their flag. As to merchant vessels, the national sovereignty being less strongly represented, distinctions were necessarily made.

Is the case the same in the territorial sea? We believe that the solution of the question ought to be sought outside the principles which we have already adduced and that we can not reason by analogy from one case to another. We recall, in fact, that we have energetically combated and rejected the doctrine which assimilated the territorial sea to the territory, and which therefore tends to attribute to the State the same rights as it has over the territory itself. We have only recognized in the State the exercise of rights

necessary for the defense and security of its coast and the protection of its commercial and fiscal interests. It is this criterion which is to serve us in fixing the extent of the territorial sea. It is from this standard that we profess to determine the extent of the right of jurisdiction.

It is impossible to deny that a State has over the adjacent sea the right of jurisdiction. We, in fact, recognize the necessity of according to it certain rights in order to guarantee and safeguard some of its vital interests. Now, this recognition would be absolutely fruitless if it were not permitted to the State to exercise this right through the organ of legislative, executive, and judicial powers. However, we do not accord to it the full right of jurisdiction over this sea. The only question is to ascertain the extent of this jurisdiction.

The notion of the territorial sea is only conceived from certain points of view: From the point of view of the defense and security of the continental territory; from the point of view of the protection of the interest of the inhabitants of the shore, as well as the commercial and fiscal interests of the country. The jurisdiction of the adjacent State can not be considered as going beyond that. Thus, by not ascribing to a State the absolute power over this part of the sea, but, on the contrary, in limiting its authority to the exercise of certain rights, we likewise restrict its jurisdiction in the same proportion.

We must then decide that the jurisdiction of the State within its territorial sea is confined to the exercise of the rights which have been recognized in its favor by the legislative, executive, and judicial organs of that State. The legislative power can only legislate in sanctioning this right, and this right alone. If it goes beyond, it violates the law of nations, and nations may justly complain of the treatment accorded to them. Likewise the executive power can decree only such measures as conform to the notion of the territorial sea as we have defined it. Finally, the judicial power will only be competent to judge of infractions committed in violation of this same right, recognized and sanctioned by the local legislation in conformity with the law of nations.

In this way the exercise of territorial jurisdiction can only extend to matters concerning coastal fishing, coastal trading, sanitary police, control of customs, police of navigation—in a word, to the matters which would constitute a violation of the rights conceded to the adjacent State over the territorial sea, and to these matters alone.

We are thus led to conclude that the adjacent State can in no way take cognizance of crimes or misdemeanors committed within the limits of the territorial sea, *when they do not as a result interfere with the exercise of its rights over this portion of the sea*; and without having the right to distinguish whether the wrong committed aboard a ship is entirely internal to it or has an exterior result.

NYS: Le Droit International. Paris, 1904.

Volume I, page 441.—Ports, coves, roadsteads, bays, and harbors.—It is a controverted question whether ports, coves, and inclosed or open roadsteads and harbors, which may be assimilated to coves and roadsteads, are part of the littoral sea under the same head as the open space delimited along the coast on a thesis which we will examine hereafter, or whether they are to be considered a part of the territory.

The interest and importance of the problem is derived from the various theories, supported by authors, on the subject of the right of the State over the coastal sea. Some claim it to be a right of sovereignty, others of jurisdiction, others still that it is not even a right of jurisdiction, but merely the application of simple measures of defense.

If the thesis of the right of sovereignty of the bordering State over the littoral sea is correct, it is without practical utility to examine further the special case of ports, coves, roadsteads, and harbors, for the solution is simple. Ports, coves, roadsteads, and harbors are subjected to the entire authority of the State. But if one of the other theses concerning the right of the bordering State is to be accepted as a legal fact, the problem which we have just stated must be considered, since upon its solution depends the more or less complete exercise of the power of the State. . . .

Some maintain that a distinction ought to be established, and that, speaking exactly, the territorial sea comprises neither the ports nor any other portions of the sea inclosed within the land, *intra fauces terra*, to use their expression. It is moreover, as we shall have occasion to state, a theory, according to which, when the coasts are irregular and form headlands, and when, consequently, there are indentations, coves, bays, and gulfs, the littoral sea commences only from a line drawn from one headland to another.

Other authors maintain that you can not withdraw from the character of the littoral sea what constitutes in fact a part of it. Among these last is Edouard Englehardt. He maintains that the authority of the State is subject to restrictions, not merely in the littoral sea delimited by the imaginary line outward, but also in the concavities. He maintains that if a right of passage exists in the zone which extends toward the open sea, it is impossible to enforce permanently the will of the adjacent State, the ports, coves, roadsteads, and harbors are by no means completely subject to its authority. He shows that in ports foreign consuls may exercise certain administrative authority, and, in some countries, even are charged with maintaining internal order aboard their national merchant ships.

If we admit theory other than that which recognizes the sovereignty of the bordering State over the littoral sea, we must, in the

matter of ports, coves, roadsteads, and harbors, align ourselves with the opinion which establishes the distinction between those portions of the sea inclosed within the land and the littoral sea itself. In that portion of the sea of which we speak, the power of the State is exercised completely, and it matters little that in certain countries the State may permit the intermittent exercise of some foreign authority. The State is the sovereign; it possesses the right of complete domination; it can impose its will and make it effective; acts of exclusive jurisdiction depend upon its will alone.

The Institute of International Law discusses a project to regulate the legal status of vessels and their crews, etc., in foreign ports. It adopted preliminary resolutions in so far as specific regulations were concerned. One of the articles reads as follows:

Ports, coves, closed and open roadsteads, bays and harbors which may be assimilated to these coves and roadsteads, are not merely placed under the right of sovereignty of the States to which they are adjacent, but are also a part of the territory of those States.

This proposition is excellent, except upon one point. We must disregard the mention of open roadsteads which are a part of the littoral sea.

It is interesting to note that in several States harbors are a part of the inalienable public domain.

In France this was the case under the *ancien régime*. The law of November 22/December 1, 1790¹ and Article 538,² likewise affirmed this status of ports. Ports situated near the mouths of rivers are a part of the fluvial public domain although ships of war have access.

In other countries the control of the central government is very limited. In Great Britain the administration of ports is very largely placed in the hands of public bodies, generally these are elected by the city itself. The port of Bristol, and a number of secondary ports, belong to the municipality. In Ireland the small number of ports are dominated by the Government. Besides these public bodies there are special dock societies, and individuals even are recognized as the owners of ports. . . .

Roadsteads are divided into two categories, open roadsteads and roadsteads properly so called. "Open roadsteads or anchorages at large," says Imbart Latour, "are properly parts of the sea, in which the proximity of the coast, the absence of currents and reefs, the depth and comparative tranquility of the waters, permits vessels to anchor." Roadsteads, properly so called, are sheltered either by natural promontories or by artificial works and are more intimately connected with the parts whose entrance they constitute. Roadsteads, properly so called, belong to the public domain. Open road-

¹ *Post*, p. 522.

² Civil Code.

steads are merely subjected to the police regulations which govern the territorial sea. This restrictive interpretation of Article 538Cc is admitted to-day without contradiction. We have already discussed the assimilation between gulfs and open roadsteads made by the Institute of International Law, but what Picard says constitutes a reserve. The State exercises over the littoral sea more than a police power. What we are to understand from the language of the learned engineer is that, according to him, open roadsteads are a part of the littoral sea.

The mouth of a river constitutes a part of the river itself. It is completely subjected to the sovereignty of the State. The course of the river, moreover, extends to the extreme points of the shore in which its waters leave the territory, although it has before now been confused with the waves of the sea in a basin wider than that which is in accord with the nature of a river. Heffter formulates this proposition: The islands situated at the mouth of a river are embraced as part of the territory, even when they are not occupied. They are considered as forming the beginning of the government of the country, because the elements of which they are composed have become detached from the soil itself. It is from their coast that the littoral sea commences. A *Haff* has never been considered as anything else than a part of the territory of the riparian State.

As to gulfs and bays, a distinction is made as to whether there is a certain distance between the two shores. This distance is fixed at 10 marine miles, and by certain international treaties it is carried to 12 miles according to one opinion, and, according to an older opinion, the territorial line is fixed seawards at the double range of cannon. When the distance between the two shores is less than one of the distances just indicated, when, for example, the opening can be dominated by the State, the gulf or bay is assimilated to ports, coves, closed roadsteads, and harbors.

The case is different when the opening exceeds 10 or 12 miles or the total double range of cannon following the theories to which we have alluded and the development of which we shall trace in discussing the littoral sea. Nevertheless, States have claimed over such gulfs and bays the right of sovereignty, as for example, Great Britain and the United States.

In English public law the claim of sovereignty or, to cite their own words and claims, "right of property and exclusive jurisdiction" over the "Kings Chambers" are very old. John Selden reports that in 1604 England was at peace while Spain and the United Provinces were at war, and that their ships pursued and captured each other in English waters. James I issued an order putting an end to the incursions; an ordinance fixed the limits and experts were

designated to fix the points of the surrounding seas in which vessels of the belligerents would enjoy the royal protection. Lines extending from the extremities of the headlands delimited on the maps such portions of the sea to which the denomination of Kings Chambers applied "in order to show that the King was master there."

The notion of Kings Chambers had important consequences in time of peace as well as war. According to Leoline Jenkins, under the reigns of James I and Charles II, foreign vessels were forbidden to approach the coast of England if their approach was of a nature to impede or interfere with British commerce, and when foreign vessels made prizes within the limits of the Kings Chambers the court of admiralty decreed restitution.

The notion was, moreover, welcomed by the United States, and Kent notably made himself the defender of the pretensions of the Republic, and proclaimed the right of sovereignty over all parts of the sea delimited by a line drawn between two headlands.

Let us say that the theory of the "Kings Chambers" was abandoned in the second half of the nineteenth century by Great Britain and the United States, but in the matter of certain wide bays such pretensions are still made in more than one important epoch, and even in acts of judicial and administrative bodies. Thus Great Britain claims the Solent, which extends between England and the Isle of Wight; the Bay of Fundy on the coast of Nova Scotia, whose width is from 40 to 60 kilometers, and whose projection inland is 200 kilometers; the Bay of Conception in Newfoundland, whose width exceeds 24 kilometers, and whose projection inland is from 64 to 80 kilometers. Also, so far as the United States is concerned, territoriality was claimed over that part of the sea which extends from the southern point of Florida to the Mississippi—that is, over a width of 800 kilometers, and a projection inland of 280 kilometers. In Western Australia this claim is made also over certain bays. Generally these assumptions of rights are made with fisheries especially in view; moreover they are neither uniform nor precise. Sometimes they involve a claim of sovereignty, sometimes of jurisdiction, sometimes of assimilation of the littoral sea; moreover, in recent years treaties have intervened in settling differences and controversies; the ancient theories of sovereignty and even the claims to a monopoly in the fisheries are being gradually abandoned.

Interior seas in the widest sense.—As we have seen, interior seas, in the narrowest sense of the word inclosed seas, are seas surrounded on all sides by the territory of a State and which have no direct communication with the ocean. Under the name of "closed seas" we classify interior seas to which access from the ocean is possible but which are entirely surrounded by the territory of a State and whose communication with the ocean is completely dominated by the State.

Seas in the narrow sense, "closed seas," constitute part of the territory of the State.

Interior seas may be surrounded by the territory of two or more States. These are interior seas in the wider sense of the word. So far as they are concerned, all right of a single State to their exclusive domination disappears.

Considering interior seas deprived of all communication with the ocean the riparian States have an identical right of navigation over the whole sea. They have respectively rights of sovereignty over its parts. In reality, moreover, conventions regulate the rights of the States. Thus, to cite Rivier, the Caspian Sea is inclosed by Russia and Persia. . . .

Interior seas in the wide sense are free. The mere fact that the shore belongs to several States confers that liberty; even the State to which the two shores of the strait belongs can not close its passage. "The Black Sea and the Baltic are free seas," wrote Rivier. This was the case of the Black Sea when it was surrounded on all sides by Turkey; the Sea of Marmora, although Turkey possesses its two shores and although the Dardanelles and the Bosphorus are Turkish, Turkey can not close it to international commerce. It is a part of the immense continuous mass of water which constitutes the ocean.

The liberty of the seas is a general rule, and special conventions held at long intervals do not suffice to modify the rule. In 1807, Great Britain strongly protested against the pretensions of Russia being the guarantor of the peace of the Baltic and contended that she herself had never acquiesced in the principles on which it was attempted to base the inviolability of this sea. We must, moreover, note that neither in 1854 nor 1870 was the Baltic closed to the ships of war of the belligerents, and the conventions invoked by Hautefeuille have never been renewed.

Page 497.—The littoral sea.—The notion of the rights of the adjacent State over the parts of the sea washing its coast is connected with the ancient pretensions made as to the dominion of the sea. It is a compromise between the assertion of absolute and exclusive empire by the adjacent State and the denial by other powers of this claim. The old theories concerning the sovereignty over the neighboring sea found apparent justification in considerations of practical utility, for they served, moreover, to secure an admission of the application of the local law, and for this reason it was permitted to attempt the suppression of piracy. The idea of rights over a portion of the sea was explained also by the necessity of defense, by the exigencies of the surveillance of the coast, by reasons arising out of fiscal measures or laws over the material economic interests of the population. Nor is it superfluous to show the inefficacy of a frontier which would

form the coast, according to which the rights of the State would cease at the limit of the land, thus at once opening an immense region in which all other States could impose their respective wills. "The sea must take the place of a rampart against all hostile surprise and against contraband commerce," wrote Rayneval. These two reasons are the basis of the right herein given, and that of fishing, which is a natural dependence upon it. "The sea is not merely the means of free communication open to all," writes Rolin-Jacquemyns; "it is a source and reserve of food supply." An argument is furnished by the right which States possess when neutral in time of war of being protected against injuries to which they would be fatally exposed if acts of hostility were committed along their coasts. It was, in addition, invoked as an argument for the necessities of international life to say that the adjacent State ought to fulfill certain duties toward the other members of the society of States and thus conclude that the fulfillment of these duties requires the establishment of a maritime zone in which its authority shall be exclusive.

The glossators and the early commentators of the legal renaissance established a maritime zone over which the rights of the States could be exercised. The formulæ were very different. "The sea is his to whom the adjacent land belongs"; "he who owns the adjacent land is considered as exercising empire over the sea"; "that which is done in the sea adjacent to the territory is considered as done in the territory." The idea of the right which was exercised was not very precise; sometimes the right of dominion and sometimes the right of jurisdiction was spoken of. A Scotch jurist, Thomas Rickarton, who published his *Jus Feudale* in 1563, used the word "*proprietas*." He admitted that the kings could divide the sea. He thus justified the punishment of wrongs and gave color to the pretensions to the exclusive right of fishing, but the existence of the other extensive right was never called in question. The glossator Baldus himself, and later Barthélemy, Cepolla, Sandeo, and later Saavedra, were moreover invoked as supporting by their teaching the doctrine almost generally adopted.

Among the ancient authors some take the view that the extent of the zone ought to be that in which the entire power was exercised, and according to others in which jurisdiction was exercised. Bartolus adopted a width of 100 miles, which, according to him, was less than two days' navigation. This idea, although not supported by demonstrative reason, was so prevalent in the time in which he lived that it was adopted as a fundamental rule of public law. With its aid they disposed of this distance into the sea unreservedly.

Other standards of measurement were suggested and employed. In Scotland it seems the old custom considered the entire extent of sea which the eyesight could cover in ordinary times as subjected to

sovereignty. In Scandinavia custom regards as such portions of the sea adjoining the coast from a place where from a ship the land was visible. Bynkershoek invokes an ordinance of Philip II, King of Spain, in 1565, which fixes the visual horizon as the limit. No nation may approach our coasts, harbors, roadsteads, or rivers to attack or injure the ships of our allies, under whatever pretext, under penalty of confiscation of body and goods. Bynkershoek criticizes this because the horizon varies according as the observation is made from the shore or from an elevation.

Passing in review the opinions of jurists on the subject of the coastal sea, Sarpi maintains that the dominion ought to be exercised over an extent equal to that which was necessary to the power of a State, but that injuries to other States were to be avoided.

Valin, writing in 1766, makes this comment:

Grotius and Selden have each exceeded the limit, one in indiscriminately maintaining that sovereigns have no legitimate right of empire over the sea, as the sea ought to be free to all nations for commerce and fishing; and the other in maintaining, likewise without distinction, that the sea ought to be subjected to the domain of a sovereign State, with the full exercise of the rights of sovereignty; the middle course which reason has sanctioned has been to adopt the principle of Garcias, a Spanish author, that the sea belongs to him to whom the adjacent land belongs; that it was necessary to understand this in its natural sense, without giving it an excessive application, and for the purpose fixing the point at which the domain of the adjacent nations ceased.

The author invoked by Valin is Saavedra, whom we have already cited. On the subject of Grotius we may note that he recognizes the right of the bordering State and then justifies it. The control of the sea can be exercised *ex terra* "from the shore," and in this hypothesis it is as effective as if the persons who are subjected to it are found on the land.

According to Loccenius, sovereignty over the sea can belong to no man. A part of the sea may be subjected to the empire of a king, to the extent that it is subjected to his effective dominion in such a way that the uses of navigation and innocent passage be accorded to foreigners, in conformity with the law of nations and the law of humanity.

However it is Cornelius Bynkershoek who establishes the distinction between *mare terræ* and *mare externum*, between the sea adjoining the land and the exterior sea, and which thus fixes the littoral sea. He made the distinction in his *de domino maris dissertatio*,¹ which appeared in 1702; enumerating the older theories, notably the zone of 100 miles and 60 miles, which several publicists proposed, and the

¹ Chap. 2, sec. 5.

measurement obtained by the eyesight, he concludes that the most just conclusion consists in extending the power to the range of cannon shot, because we are deemed to possess what we command. "I speak here of our epoch," he says, "in which, with our cannon, in a general way we may say that the power emanating from the shore ceases where the force of arms ends. It is indeed the force of arms that insures possession"

Godey follows Rayneval and suggests considering the visual horizon a limit, rather as a means of control than a rational basis of measurement. He shows that in times of peace the means given by eyesight permits the surveillance of vessels and the display of signals. He adds that one can not utilize completely the immense range of modern artillery or obtain an effective fire beyond the range of natural sight. . . .

Page 502.—Many descriptions of the territorial zone have been made which leave certain elements to serve as points of departure for a general examination in great indefiniteness. "The territorial sea," wrote Imbart Latour, "is the sea adjacent to the coasts over which the bordering State can employ armed force, and thus exercise the power necessary to defend its territory and its coast and to insure the security of its inhabitants and safeguard its fiscal and economic interests"

In the determination of the essentials which ought to constitute the littoral sea public law, and particularly administrative law, furnishes rules simultaneously with international law. Two points ought to be examined; that of determining the limit of the coast and where the littoral sea from this limit commences and that of determining how far the littoral sea extends.

Divergences appear in the determination and have exercised influences upon positive law.

The theory, according to which the defense of a sovereign State and its right of conservation constitute the principal aim of the determination of the maritime zone, has led to the adoption of the notion that the point of departure is at that place on the territory from which, at a given moment, the adjacent State must exercise its power. With this theory, the greatest range of cannon serves as the standard of measurement, and the calculation commences at that part of the coast which the sea does not touch even when high. Even before the theory of the greatest range of cannon was formulated, high tide served to mark the shore line

In another opinion, the point of departure is furnished by low-water mark

Special solutions have been invented to cover certain hypotheses.

When the coasts are irregular, when points of land project into the sea, when there are capes and headlands, and, consequently, small

bays and coves, the distance is calculated from a line drawn from one headland to the other.

Islands situated at the mouths of rivers and lying along the coast are considered as being part of the territory. At their extremity the littoral sea commences

The question of the final point of rivers and streams has given rise to some discussion. It has been suggested to take account of the configuration of the banks, the nature of the water on the coasts, of the volume of salt water with relation to fresh water.

An English seaman proposes to consider as territorial domain completely subject to the sovereignty of the State, as being included within the littoral sea and as indicating the limits at which it commences, those parts of the sea adjacent to the coast which do not reach certain depths.¹ He bases it on the ground that everywhere where bottom can be touched by divers, the bottom must be considered as submerged territory.

If this theory were to be adopted it would have practical consequences.

The second point which must be examined concerns the width of the littoral sea. In our day two solutions have been presented, the one proposed the adoption of the cannon shot, or to apply the formula, the greatest range of cannon shot, according to the progress of the art at each epoch. The other suggests a distinct measurement, adopted in the history of the littoral sea, which has frequently been from 3 to 4 miles, and which theory and practice nowadays tend to prolong to 6 miles or even beyond.

As we have seen, Bynkershoek formulated the rule of the greatest range of cannon, but even before his time, the protection which the strongest cannon gives had been mentioned by authorities on maritime law, and he himself cites an order of the States General to the commanders of their ships issued in 1671 which provides that they shall salute every time that they pass naval stations of foreign powers within the range of artillery. Moreover, in the last half of the eighteenth century the greatest range of cannon was adopted by jurists and put in practice by international conventions or special regulations. "However difficult it may be," wrote Hübner in 1759, "to determine justly how far over the sea the domain of the master of the shore extends, it is fixed that it extends as far as the range of artillery, which he may always use efficaciously to give notice to those who forget that they violate rights."

At the beginning of the nineteenth century, Azuni expressed himself in these terms:

The surest method of fixing the extent of the territorial sea adjacent to the coasts that are not irregular is, in my opinion,

¹ Haynes, *Territorial Waters and Fishing Rights*, 1893.

to limit it at a space which a projectile fired from a cannon can cover, or, at the point at which a cannon shot fired from a cannon on the shore can strike a ship. This opinion appears to me in conformity with the principles of universal law, by which all the space in which magistrates and ministers can execute the orders of their government by the force confided to them must be considered as territory.

But even Azuni was willing to abandon the rule which he thus posited, or rather he showed himself favorable to the fixed measurement intended to replace the variable distance to which it gave rise. "It would seem reasonable to us," he added, "that, without examining whether the power, mistress of the territory, possesses certain fortresses or a battery constructed on the open sea, we ought to determine definitely and everywhere that the jurisdiction over the territorial sea extends only to 3 miles distance, which is, without contradiction, the greatest range of cannon to which the force of powder can shoot a bullet or bomb."

During the greater part of the nineteenth century the rule of the greatest range of cannon has been generally accepted by authors. We must note, as we have already done, that the conservation of the rights over the littoral sea has not been subordinated to the establishment of permanent works. We must also observe that coasts generally present sinuosities and the measurement from points on the shore not being possible without inconvenience, a line extends, drawn from one headland to another, and this line is constituted the point of departure for the range of cannon.

The greatest range of cannon has been criticized as uncertain, changeable, and as necessarily subservient to the improvements of inventions in the art of ballistics. In fact, between the 700 meters, the extreme range of cannon in Bynkershoek's time, and the range of the most effective cannon of our epoch the difference is considerable. Thus we can understand why, in our day, authors insist on having a definite measurement adopted, and governments in their decrees and international conventions have established such a measurement. As is determined at every moment the modern State wished to fix its rights and to eliminate all doubt and uncertainty surrounding it. The same State extends its functions continually and it is logical that it should wish to determine with exactness the extent of the littoral sea and set up exactly the limits of the authority which it exercises over it.

In international law the general contemporary rule is the substitution of a uniform standard of measurement, invariable from a certain number of miles to the greatest range of cannon. It is to this measurement of this number of miles that we must have recourse when there is no special convention. There has been produced here a substitution interesting to note. The greatest range of cannon has

ceased to be in force as the general rule. The system devised and developed by the glossators and commentators is again in force, with the correction, however, that the exercise of dominion over 100 and 60 miles has been abandoned.

The calculation of the distance in linear units which the English Government used for the determination of the jurisdiction of the customs appeared in conventions as early as the last half of the eighteenth century. In 1763 the treaty of Paris, concluded between France and Spain on the one hand and Great Britain and Portugal on the other, put an end to the right of the fishing of French subjects at a distance of 3 leagues from the coast in the Gulf of St. Lawrence, and at a distance of 15 leagues off the Island of Cape Breton, and thus determined in marine leagues the zone of the littoral sea subjected to Great Britain. In 1774 the treaty concluded between Spain and France fixed 2 leagues as the distance for the right of visiting small vessels.

In 1806 the treaty concluded between Great Britain and the United States provided two methods of calculation. By the terms of Article 12, if one of the two contracting States was to become a belligerent, it could not pursue the vessels of the enemy within 5 marine miles of the coast of the other contracting party if neutral; if its antagonist does not recognize this limit of maritime jurisdiction when both contracting parties are neutral, the limit shall be 3 miles. By the terms of Article 19 the contracting parties will not permit their ships to be taken within range of a cannon nor within the limits fixed by Article 12.

The calculation in linear units was soon adopted in the public law of several countries. To cite an example, the decree of the Council of Prizes of France, under date of 27 Thermidor, year VIII, fixed the distance of 3 marine leagues as forming the limit within which no prizes could be legally effected or declared good.

Up to the present time the distance of 3 miles has been most generally adopted. It figures in conventions relating to fishing. It is, moreover, in its connection with fishing that in times of peace the idea of the littoral sea has its greatest importance.

By Article I of the convention concluded October 20, 1818, between the United States and Great Britain, it was stipulated that the citizens of the United States would have the right of carrying on fishing along the coasts of the British possessions in North America in the same way as British subjects; but it was equally stipulated that for all the coasts not comprised within the enumeration made in the convention, citizens of the United States could not take fish within a radius of 3 miles from those coasts.

A fishing convention was concluded August 2, 1839, between France and Great Britain. "The subjects of His Majesty the King of

France shall enjoy the exclusive right of fishing within a radius of three miles from low-water mark along the entire extent of the coasts, and the subjects of His Britannic Majesty shall enjoy the exclusive right of fishing along the entire extent of coasts of the British Isles." It was stipulated that over that part of the coast of France which was included between Cape Carteret and Point Menga the exclusive right for all kinds of fishing would only belong to French subjects within the limits of Article I of the convention. It was likewise understood, as we have said before, that the radius of 3 miles, fixing the general limits of the exclusive right of fishing on the coasts of the two countries, established the measurement for bays whose opening on the sea did not exceed 10 miles from a straight line drawn from one headland to another.

A convention was signed at The Hague May 6, 1882, by several maritime States having reference to the policing of fishing in the North Sea beyond territorial waters. The contracting parties were Germany, Belgium, France, Great Britain, and the Netherlands. Article 2 provides that the national fishermen shall enjoy the exclusive right of fishing within a radius of 3 miles from low-water mark along the entire extent of the coast of their respective countries, as well as of the islands and bays dependent upon them. "For the bays," the same article reads, "the radius of three miles shall be measured from a straight line drawn across the mouth of the bay in the narrowest part of the entrance, at the first point at which the opening does not exceed ten miles." It is to be noted that the application of Article 3 determines the limits of the North Sea.

The distance of 3 miles figures in international acts other than in conventions relating to fishing. For example, it is stipulated in the treaty of Constantinople, of October 29, 1888, for the neutralization of the Suez Canal, which nine powers concluded and which, in Article 4, includes a prohibition for right of war in the canal and its ports of access, as well as within 3 miles of those ports.

The legislation of a great number of states has likewise adopted the radius of 3 miles. The chief subject of the British Territorial Waters Jurisdiction Act of 1878, of the French law of March 1, 1888, forbidding foreign fishing within 3 miles of low-water mark, and the decree of June 12, 1896, and the laws and regulations of many countries concerning prizes and declarations of neutrality and other ordinances fix the same limit. The Bering Sea arbitrators declared that the limit of 3 miles is the ordinary limit. . . .

Twenty years ago Germany and Mexico agreed that along the coast of the latter country the territorial sea was to be carried to 3 marine leagues to serve as a protection against contraband.

The Norwegian and Swedish legislation places the limit at 4 marine miles. They maintain it for matters of jurisdiction, neu-

trality, customs, fishing, and sanitary police. The rule goes back, it would seem, to the eighteenth century. They explain it by the configuration of the coast, by the fact that rocks of solid earth are continued under the sea and emerge at a great distance, by the number of fiords with large mouths. Within a line drawn from one rock to another or else within the islands situated in the mouth of the fiord, the waters are considered interior seas, and fishing is made the object of inspection and regulations.

The Spanish legislation establishes the radius of 6 miles for fishing and customs, but in all other respects the radius of 3 miles constitutes the general rule.

We may add that the establishment of the 3-mile limit has occasioned considerable criticism. Even Azuni, who proposed to limit the extent of the littoral sea when there was a question of establishing restrictions upon the liberty of passage of foreign vessels and of making customs visits, showed himself in favor of enlarging the zone when there was a question of protection against hostilities and against expeditions of belligerents. In the latter case he advised the adoption of a radius of 6 miles and he cited "as an example of national equity and moderation" the treaty concluded in 1740 by the Ottoman Porte and the Kingdom of Naples. "In all places belonging to one of the two sovereigns," it said, "whence one may recognize ships or whence ships may perceive the coast, it will not be permitted on the part of either Power that ships be pursued or molested."

The question was raised in a note addressed on October 16, 1864, by William H. Seward, Secretary of State of the United States, to the British Minister. Two points were mentioned. Ought not the jurisdiction of the bordering State to be extended from 3 to 5 miles, and was it not advisable to adopt a definite limit in figures in order no longer to depend upon the range of cannon shot? He proposed modifications to the existing rules. . . . On the supposition that the range of cannon shot was 5 miles, Seward would have forbidden firing within 8 miles of the coast.

An argument was also deduced from the fishing interests. It was invoked in 1893 by a commission appointed by the British Government. The commission proposed to assemble an international conference of the States which signed the convention of May 6, 1882, concerning the police of fisheries in the North Sea outside territorial waters. . . .

In 1895 the Government of the Netherlands addressed a collective note to the different powers by which it invited them to a conference to fix the limits of the littoral sea, and proposed to take as a basis for negotiations the limit of 6 miles, with a neutral zone of the same

width. But objections were raised against the adoption of a total zone of 12 marine miles, that is, more than 22 kilometers; for neutral States, who have not only rights but also duties, the extent of sea in which they could effectively enforce their neutrality and punish infractions would be too large. For belligerents it would have the dangerous result of restricting the space of open sea and consequently lead to a violation of the littoral sea of neutral States in compelling enemy fleets to make the littoral sea the theater of their hostile engagements.

States have frequently established special zones in which to apply their customs laws, their laws concerning fishing, and their regulations of sanitary police.

To cite some examples with respect to customs: In 1736 Great Britain established a right of surveillance of 4 marine leagues, that is, 12 marine miles. In 1797, 1799, and again in 1807, the United States adopted a provision analogous to the English law of 1736. By the terms of the French law of August 6-22, 1791, the frontier on the sea extends to a distance of 2 leagues from the coast. By the terms of 4 Germinal, year II, a sea captain having arrived within 4 leagues of the coast, shall, on request, display a copy of the manifest, stating the nature of the cargo to a customs inspector who was to come on board and *visé* the original. According to the same law the customs inspector was to visit all ships below 100 tons "at anchor or hovering within 4 leagues of the coast of France except in case of *force majeure*." A law of March 27, 1813 [1817], extended the zone up to 2 myriameters, somewhat more than 4 leagues.

If some States leave the coastal fishing free for foreigners as for nationals, other States reserve a monopoly for their nationals, or impose a license fee upon aliens. In this case a delimitation is made; often it extends beyond the traditional limits of the littoral sea.

Some States require that at a definite distance ships coming from infected ports shall hoist the quarantine signal. Great Britain requires this signal to be raised at a distance of 12 marine miles.

A problem is posited with respect to these zones: In the absence of conventions do they not constitute a violation of international law? Have not other States the right to make claims? Wheaton has noticed this delicate point. The answer must be that exceptions to a general rule of international law can only be established by virtue of an agreement of States.

Page 517.—Recently a French jurist, de Lapradelle,¹ has reversed the usual rôles ascribed to States whose interests conflict within the territorial sea, and has tried to show that the different maritime zones constitute coastal servitude for the benefit of the adjacent State. He regards the sea as susceptible of being the property of a juristic person which he would make the international society of States. The

¹ See *ante*, p. 183.

riparian State would have the right of limiting near the coast the free use of the sea. Thus he would legitimate the right of forbidding naval warfare within the vicinity of the coast, that of establishing a customs frontier, as well as that of undertaking measures of sanitary police. But, without touching upon the question as to whether the notion of international servitude is legal, we shall merely remark that international servitudes are established by convention, that they deal with the relations of State to State, that they presuppose two territories, two domains, belonging to different States, of which one is servient while the other is dominant. . . . The sea is not common. There is no collective domination of the States, and there are still other objections to the new theory, although these seem to us sufficient. Moreover, if this thesis is adopted, how can we justify the obligations which are incumbent upon the adjacent State, the principal objects of which are to insure order, to punish crimes, to take the necessary measures for the security of navigation, and to assist foreign vessels encountering the dangers of the sea. . . .

DE OLIVART: *Tratado de Derecho Internacional Público.* Fourth edition. Madrid, 1903.

§ 41, page 203.—*Things likely to be international property (inland seas, lakes, territorial seas, ports, etc.).*—Having determined the things over which it is impossible for the States to have any particular right of appropriation, and also those in which, if possible, such right of appropriation is limited by the right of use thereof of other nations, we must finally concern ourselves with those other things of which there exists an absolute right of possession, but only inasmuch as conditioned by international law. Among the latter, inland seas occupy the first place; not only those which, being properly considered as great lakes,¹ belong to the class of possessions owned by the power or powers within whose territories they are inclosed, as obtains, for instance in the case of the Caspian Sea, but also those others which communicate with the ocean by means of a strait, e. g., the Zuyder Zee, the Baltic, etc. The Ottoman Porte has declared it always to be its traditional rule of conduct to forbid entrance into straits to warships of all other nations; it also declared the neutralization of the Black Sea which, ratified by the treaties of 1841 and 1856, was revoked by the London conference in 1871 and the treaty with Russia at the same place and date; the treaty of

¹ Thus Lake Constance (Bodensee) is the common property of Austria, Württemberg, Bavaria, and Switzerland.

Berlin in 1878 not having taken up that question.¹ It is a universally recognized principle that the right of national defense is legally exercised over the nearest part of the sea washing the coast owned by the State. The generally practiced international law, repeatedly confirmed by conventional law, limits the extent of territorial sea to the range of a cannon, which is considered to be equivalent to 3 nautical miles; but as in such case, the rule laid down by Bynkershoek: *Terræ potestas finitur ubi finitur armorum vis*, is applicable, such geographical limit can not be considered invariable, as at all times it is dependent upon progress in arms of warfare.² If the jurisdiction

¹ The Black Sea belonged exclusively to Turkey until 1774 (Kuchuk-Kainarji treaty). By the treaty of Adrianople the principle of free navigation was established. The treaty of 1841 forbade the entrance of warships into the straits of Bosphorus and the Dardanelles. Article XI of the treaty of Paris, in 1856, forbids the entrance of any warship into the Black Sea except those mentioned in the appendix thereof and the light craft used by the legations, and also forbids the possession, by riparian nations of arsenals on the coast. Russia, in 1870, declared her intention of not complying with the treaty in this last respect, representing to Lord Granville that such a measure could not possibly have any validity without the previous consent of the interested powers. Therefore, the London Conference of 1871 was called. Its protocol says that no power can, of its own will and without a friendly understanding with the other signers, free itself from what is solemnly agreed upon in the treaties. In the treaty of London which ensued, it was agreed to revoke Articles xi, xiii, and xv of the treaty of Paris, referring to the Black Sea, allowing Turkey to permit the entrance of the warships of friendly nations as a means of better complying with the treaty of Paris of 1856 (Article 11). In another conference of the same date, Russia and the Porte revoked the appendix to the treaty of Paris which limited the number of warships allowed in the Black Sea. The treaty of Berlin does not mention this point at all. It only says, in Article 63, that the treaty of Paris and that of London declare nothing contrary to it. In the protocol of said treaty Lord Salisbury declares that: "The obligations of H. M. are to respect the determinations of H. I. M. in accordance with the already existing treaties" (prot., 18), and the Russian plenipotentiary answered that "the principle governing the closing of straits is a European principle and that the ratification of the treaties of Paris is obligatory on all signing powers."

² Vallin claimed it should be as far as where bottom could be reached. Rayneval extended it as far as the range of vision or the horizon. Baldus and Bodino, before the XIV century, favored 60 miles. Abreu claimed it should be 100 miles, and others that it should be equal to a two days' journey.

Bynkershoek has formulated the rule by which the extent of territorial sea can be determined. "*Terræ potestas finitur ubi finitur armorum vis.*" An immense majority of ancient and modern writers accept Bynkershoek's rule, and perhaps Riquelme is the only contemporaneous writer to be found attacking it, claiming that each State can freely fix the limit of its jurisdiction and dominion (according, says he, to the topographical character of its coasts, its real means of defence, and the class of dangers to which it is exposed) *with the knowledge of the other nations.*

Our port law provides in its second article: "The things to be considered subject to national dominion and public use, without any prejudice to private rights, are: 1°, The beach zone, which is the coast space or sea frontier of the Spanish territory washed by high and low tide and as far as where the heaviest breakers can reach at high tide or during a storm. Said zone also extends to the shores of rivers as far as where they can be navigable or are subject to the influence of the tide. 2°, The littoral sea, or the sea zone bordering the coasts and frontiers of Spanish domains, the full width thereof to be determined by international law, with its coves, havens, bays, ports, and any other harbor useful for fishing and navigation. The coast patrol and advantages of the zone are under the States' control as also the right of refuge and immunity according to international laws and treaties." This is evidently very vague and one must believe that the law accepts the three-mile principle; but it is well to remember the following extract from the R. C. of June 14, 1797 (l. 5, tit. viii, lib. vi, latest edition). "The line of immunity of the coast of all domains must not necessarily be determined, as it has been until now, by the varying and uncertain range of a cannon, but by a distance of two miles of 950 fathoms each."

In times of peace the larger or smaller width of territorial sea is of little importance, since warships are allowed to navigate therein provided they mean no offence, comply

of the State is as exclusive over the territorial sea as it is over land, the natural conclusion must be that fishing rights are strictly and exclusively reserved to the subjects of that State, although, if the States wish to protect their interests and avoid ready causes of disagreement, they can agree to renounce their mutual right and allow fishermen to throw their nets in territorial waters without their having to stop and verify in what territory they are fishing. This point was agreed upon in a Coast Fisheries Conference between Spain and Portugal, held on July 14, 1878, and revoked by the two subsequent treaties of the 2d of October, 1885, and March 27, 1893, and is still in force between this country (Spain) and France, by the treaty of Bayonne. February 18, 1886.¹ Territorial sea should begin at the low tide line and it should be taken into account that, according to the principles of civil law, the islands adjoining the mainland should be considered as undoubtedly belonging to it.² Those portions of the sea penetrating into a territory without forming an inland sea, undoubtedly and in principle belong to the possessor of such territory, although in practice it is difficult to point the way in which nations can exercise effective rights over the same. If the mainland, through explosive mines and batteries under its control can completely command the entrance into a gulf or bay, it is evident that all that portion of the sea should be considered territorial.³ There is no

with the fishery laws and accept the criminal and fiscal jurisdiction of the State; in time of war it becomes a most important subject of consideration, as it is the duty of the belligerent nations to respect neutral territory and carefully avoid any demonstration of hostility therein.

¹ Articles 19 and 21 of the treaty of March 27, 1893:

Article 19. The coast and fishery patrol of both countries shall be subject to the agreements contained in the rules enumerated in Appendix No. 6 attached to this treaty.

Article 21. The decisions of this treaty are not applicable to the coasting trade, which comes under the laws and rules of each country as per recommendations contained in rules of Appendices No. 3 and 5.

Rules for fishery and coast patrol.—Article 2. Six miles, counting from the low tide line, constitutes the limit within which general right to fish is reserved exclusively to the fishermen subject to the jurisdiction of the respective nations.

For bays whose opening does not exceed 10 miles, 6 miles shall be counted from a straight line run across from point to point of the opening.

The miles herein mentioned are to be geographical miles of 60 to a degree of latitude.

² Stowell's decision in the case of the *Anna* was rendered according to these principles. The question was whether certain islands in the mouth of the Mississippi belonged to the United States or were without an owner, the territorial sea to be measured from Fort Balise, built in the mouth of the river by the Spaniards. Lord Stowell, considering that those islands had gradually been formed from United States land pronounced himself in favor of the latter, basing his decision on the well-known axiom of the Institutes (II, 1, par. 21): "That which the river hath withdrawn from thy land and carried to neighbouring land remains thine." "I believe," said the learned judge, "that the protection of the territory should be reckoned from these islands since they are natural portions of the adjoining coast out of which they were formed."

³ Theory and practice do not agree on this particular; in the treaty of 1893 between France and England, it was established that the radius of three miles determining the width of territorial waters, should apply to bays whose mouth at its broadest point does not exceed ten miles from a straight line drawn from headland to headland. (See Article 2 of the fishery treaty between Spain and Portugal, note 4.) The Zuyder Zee undoubtedly belongs to Holland and the Gulf of Genoa to Italy. The exclusive rights of England over the King's Chambers have never been recognized by continental nations.

doubt that any State has absolute right over its ports either to close them entirely against any foreign trade or to open them upon certain conditions, or also to declare them absolutely free from all entry fee. . . . The State can reserve coasting trade rights to its subjects and also extend its sphere of action to a zone wider than 3 miles in order to check contraband trade, especially smuggling carried on by its own people.¹

H. B. OPPENHEIM: *System des Völkerrechts*. Second edition. Stuttgart and Leipzig, 1866.

Page 127.—The ocean is free; that is, it is the possession of the entire world. Just as it can not become subject to "*corporalis detentio*" so an absolute naval supremacy is inconceivable. Those common articles which can not become private possession, the "*res meræ facultatis*" can be true public property of a State only in so far as they belong to the direct interest of the individual State. With regard to the ocean, however, all States have an equal interest; the ocean is "*res omnium communis*" as the air; while the navigable stream only, as the highway, is "*res publica (civitatis)*."

But where does the ocean begin? Where does it end? The mouth of the river belongs to the land; the coasts themselves are land. They draw no exact line, ebb and flow of tide influence them. And what kind of possession, what kind of safety would it be, and how would protection of your own State be possible, if the right of the State ended with the coasts; if the land were State property, but the landing "*jus commune*?" The justice of the matter must consequently be considered. The State has to use its power for the fulfilment of its highest duty, self-preservation in independence, sovereignty, and equality. The property of the State extends as far as the direct material influence, "*corporalis detentio*;" or according to the old saying: "*Terræ dominium finitur, ubi finitur armorum vis*," or as Bynkershoek says: "*Non ultra quam e terra mari imperari potest*."

For the confirmation of these principles no political treaties are necessary, they follow from the conception of the State and are recognized customs. To be sure there are "*Pacta specialia*" which modify these principles in special cases. "*Armorum vis*" means at

¹ The Customs Ordinance of 1870 provides in article 42, cap. vi, lib. ii: "The government in order to secure collection of the customs duties, exercises jurisdiction along the coast from the moment the vessel enters Spanish jurisdictional waters, which have an extent of six miles, equivalent to 11.111 kilometers from the coast."

the present time "cannon shot distance"; for that distance the sea belongs to the coast.¹ . . .

Accordingly it is self-evident that thus far the inner inclosure of coasts, inlets, bays, sounds, straits, canals, ports, and mouths of rivers, as well as all parts of the ocean bordering on the land, all belong to the jurisdiction of the State and not to the free sea; and accordingly can be closed in war, or opened only against port dues; that thus far the possessing State can regulate the naval ceremonial agreeable to itself, the salute, etc. It is furthermore self-evident that inland seas form a part of the State or territory, since they are actually surrounded by the same, and it would be out of the question to conceive of a natural right of way of all nations through the State inclosing the inland sea, as indeed enclaves do not possess such a servitude of passage without a special agreement. Where, however, an inland sea is surrounded by several States, either the above principles of freedom of the sea, or the rule in the case of rivers prevails; the same as when a river separates different States or flows through them.

The actual maritime sovereignty of the State is therefore limited to the ports, mouths of rivers, etc. But many States have tried to extend this jurisdiction. The British Isles do not wish to be separated in the interior by the sea, and therefore claim ownership of their so-called "narrow seas"—namely, all the waters which can be inclosed by imaginary lines drawn between the extreme headlands of Ireland, Scotland, and England. The inclosures thus formed are called the King's (or Queen's) Chambers. As early as James I and Charles II, the court of admiralty is said to have guaranteed British vessels against losses from piracy committed therein. As with the English "King's Chambers" so North America makes similar claims (having her safety in view) over the Delaware Bay. The admiralty courts of the countries in question have known how to procure for these claims a kind of general recognition. Holland formerly admitted the "narrow seas."

Strangely, a British law (9 Geo. II, cap. 35, of 1736) lays claim to 4 sea miles for English jurisdiction and possession. Still under all circumstances it must be evident that this English law concerning the "narrow seas" is inapplicable for the mere reason that the English would have to admit the consequences of their principle to the States lying opposite them, as a "*Venia vicissim petita ac data*."

¹ Grotius, Vattel, Bynkershoek, and nearly all moderns adhere to the principle of "cannon distance," which of course to-day has a different significance, at least in extent or range, from formerly on account of the perfection of heavy guns. Still there are treaties now that make the distance three sea miles. See, for example, the treaty between England and North America of October 20, 1818 (Article 1), the English-French treaty of August 2, 1839 (Articles 9-10) and compare with these the Belgian law of June 7, 1832. The low-water mark is usually taken as basis for reckoning.

Another objection to the freedom of the sea lies in the claim of the closure of a sea. The so-called inclosed seas, "*Maria clausa*," have always presented arguments. Of course, the Atlantic Ocean can not be inclosed, but not so with the Strait of Gibraltar, the Danish-Swedish Sound, the Bosphorus, etc.

The closure of the Straits of Gibraltar would make the entire Mediterranean Sea an enclosed sea for non-adjacent States, and an inland sea for adjacent countries; but this sea is free by the law of nations since it can not be commanded from land by "*armorum vis*." On the contrary the fortresses of the Dardanelles command the entire strait at the entrance to the sea of Marmora and the cannons of Constantinople and Scutari, the Bosphorus; and thus close the Black Sea to all nations in spite of Russia's claim to it. This condition was generally recognized up to the treaty of July 13, 1841, which referred the question at issue back to the Russian-Turkish treaty of Adrianople, 1829, Article 7. This opened the Black Sea for all times of peace.

Denmark's levying of "sound dues" dates back to 1658, when she still possessed both shores of the Baltic Sea. She ruled the only passage to and from the Baltic Sea, as is clearly expressed in 1368 by the Hanseatic League, in 1490 by England, in 1645 by the German Emperor and Kingdom in a treaty about customs tariff, in 1544, 1645, and 1701 by the Netherlands, in 1633 by France, in 1720 by Sweden, and especially in 1780-1800 by the "armed neutrality," but specifically by Russia in a declaration of war against England which contested the Danish right. In these treaties definite duties are specified generally for the maintaining of lighthouses, signals, etc.¹

"Sound duties" were unique; they became more and more oppressive to trade. North America and Prussia tried long to do away with them, the former at last in a forceful manner; and thus in 1857 redemption treaties were ratified between Denmark and all the other naval Powers. Free commerce through the Sound, the Baltic Sea, and the Cattegat began April 1, 1857.

Altogether Denmark received from the different nations after the capitulation a sum of thirty and some odd million "*Rigsdaler*." She agreed, on her part, to maintain the lighthouses upon the Swedish-Norwegian side. (The main treaty contains also definite decisions about other port and transit rates.)²

Formerly pretensions of sovereignty in the sea existed: for example, that of the mighty republic of Venice upon the Adriatic Sea which made Venice supreme, and Genoa in the Ligurian sea (Gulf of Genoa). In the newly discovered oceans the first explorers and then

¹ Compare Wheaton's *Historie*, etc., pp. 105-108. Vattel, I, 23, par. 292, especially Kamptz, *Lit. des Völkerrechts*, par. 176.

² Compare the treaty of Copenhagen, Mar. 14, 1857.

England asserted the most extended rights over the East Indian coasts.

These and many other claims of the same kind had more reference to the possession and shutting up of the colonies there, with the commerce of which the question of the freedom of the sea is naturally closely connected.

L. OPPENHEIM: *International Law. Second edition. London, New York, 1912.*

MARITIME BELT.

Volume 1, page 255, § 185.—Maritime belt is that part of the sea which, in contradistinction to the Open Sea, is under the sway of the littoral States. But no unanimity exists with regard to the nature of the sway of the littoral States. Many writers maintain that such sway is sovereignty, that the maritime belt is a part of the territory of the littoral State, and that the territorial supremacy of the latter extends over its coast waters. Whereas it is nowadays universally recognized that the Open Sea can not be State property, such part of the sea as makes the coast waters would, according to the opinion of these writers, actually be the State property of the littoral States, although foreign States have a right of innocent passage of their merchantmen through the coast waters.

On the other hand, many writers of great authority emphatically deny the territorial character of the maritime belt and concede to the littoral States, in the interest of the safety of the coast, only certain powers of control, jurisdiction, police, and the like, but not sovereignty.

This is surely erroneous, since the real facts of international life would seem to agree with the first-mentioned opinion only. Its supporters rightly maintain¹ that the universally recognized fact of the exclusive right of the littoral State to appropriate the natural products of the sea in the coast waters, especially the use of the fishery therein, can coincide only with the territorial character of the maritime belt. The argument of their opponents that, if the belt is to be considered a part of State territory, every littoral State must have the right to cede and exchange its coast waters, can properly be

¹ Hall, p. 158. The question is treated with great clearness by Hellborn, *System*, pp. 37-57, and Schücking, pp. 14-20.

met by the statement that territorial waters of all kinds are inalienable appurtenances¹ of the littoral and riparian States.²

§ 186.—Be that as it may, the question arises how far into the sea those waters extend which are coast waters and are therefore under the sway of the littoral State. Here, too, no unanimity exists upon either the starting line of the belt on the coast or the breadth itself of the belt from such starting line.

(1) Whereas the starting line is sometimes drawn along high-water mark, many writers draw it along low-water mark. Others draw it along the depths where the waters cease to be navigable; others again along those depths where coast batteries can still be erected, and so on.³ But the number of those who draw it along low-water mark is increasing. The Institute of International Law⁴ has voted in favor of this starting line, and many treaties stipulate the same.

(2) With regard to the breadth of the maritime belt various opinions have in former times been held, and very exorbitant claims have been advanced by different States. And although Bynkershoek's rule that *terræ potestas finitur ubi finitur armorum vis* is now generally recognized by theory and practice, and consequently a belt of such breadth is considered under the sway of the littoral State as is within effective range of the shore batteries, there is still no unanimity on account of the fact that such range is day by day increasing. Since at the end of the eighteenth century the range of artillery was about three miles, or one marine league, that distance became generally⁵ recognized as the breadth of the maritime belt. But no sooner was a common doctrine originated than the range of projectiles increased with the manufacture of heavier guns. And although Great Britain, France, Austria, the United States of America, and other States, in municipal laws and international treaties still adhere to a breadth of one marine league, the time will come when by a common agreement of the States such breadth will be very much extended.⁶ As regards Great Britain, the Territorial Waters Jurisdiction Act⁷ of 1878 (41 and 42 Vict., c. 73) specially recognizes the extent of the territorial maritime belt as 3 miles, or 1 marine league, measured from the low-water mark of the coast.

¹ See § 175. Bynkershoek's (*De Domino Maris*, c. 5) opinion that a littoral State can alienate its maritime belt without the coast itself, is at the present day untenable.

² The fact that Article 1 of Convention XIII (Neutral rights and duties in maritime war) of the Second Hague Peace Conference, 1907, speaks of sovereign rights . . . in neutral waters would seem to indicate that the States themselves consider their sway over the maritime belt to be of the nature of sovereignty.

³ See Schücking, p. 13.

⁴ See *Annuaire*, vol. xiii, p. 329.

⁵ But not universally. Thus Norway claims a breadth of 4 miles and Spain even a breadth of 6 miles. As regards Norway, see Aubert in *R. G. I.* (1894), pp. 429-441.

⁶ The Institute of International Law has voted in favor of 6 miles, or 2 marine leagues, as the breadth of the belt. See *Annuaire*, vol. xiii, p. 281.

⁷ See § 25, and Maine, p. 29.

§ 187.—Theory and practice agree upon the following principles with regard to fisheries, cabotage, police, and maritime ceremonials within the maritime belt:

(1) The littoral State can exclusively reserve the fishery within the maritime belt¹ for its own subjects, whether fish or pearls or amber or other products of the sea are in consideration.

(2) The littoral State can, in the absence of special treaties to the contrary, exclude foreign vessels from navigation and trade along the coast, the so-called cabotage,² and reserve this cabotage exclusively for its own vessels. Cabotage meant originally navigation and trade along the same stretch of coast between the ports thereof, such coast belonging to the territory of one and the same State. However, the term cabotage or coasting trade as used in commercial treaties comprises now³ sea trade between any two ports of the same country, whether on the same coasts or different coasts, provided always that the different coasts are all of them the coasts of one and the same country as a political and geographical unit in contradistinction to the coasts of colonial dependencies of such country.

(3) The littoral State can exclusively exercise police and control within its maritime belt in the interest of its custom-house duties, the secrecy of its coast fortifications, and the like. Thus foreign vessels can be ordered to take certain routes and to avoid others.

(4) The littoral State can make laws and regulations regarding maritime ceremonials to be observed by such foreign merchantmen as enter its territorial maritime belt.⁴

§ 188.—Although the maritime belt is a portion of the territory of the littoral State and therefore under the absolute territorial supremacy of such State, the belt is nevertheless, according to the practice of all the States, open to merchantmen of all nations for in-offensive navigation, cabotage excepted. And it is the common conviction⁵ that every State has by customary International Law the *right* to demand that in time of peace its merchantmen may in-offensively pass through the territorial maritime belt of every other State. Such right is correctly said to be a consequence of the freedom of the Open Sea, for without this right navigation on the Open Sea by vessels of all nations would in fact be an impossibility. And it is a consequence of this right that no State can levy tolls for the mere passage of foreign vessels through its maritime belt. Although the littoral State may spend a considerable amount of money for the erection and maintenance of lighthouses and other facilities for safe

¹ All treaties stipulate for the purpose of fishery a three miles wide territorial maritime belt. See, for instance, Article 1 of the Hague Convention concerning police and fishery in the North Sea of May 6, 1882. (Martens, *N. R. G.* 2nd series, vol. ix, p. 556.)

² See Pradler-Fodéré, V, Nos. 2441, 2442.

³ See § 579, where the matter is more amply treated.

⁴ See Twiss, I, § 194.

⁵ See § 142.

navigation within its maritime belt, it cannot make merely passing foreign vessels pay for such outlays. It is only when foreign ships cast anchor within the belt or enter a port that they can be made to pay dues and tolls by the littoral State. Some writers¹ maintain that all nations have the right of inoffensive passage for their merchantmen by usage only and not by the customary Law of Nations, and that, consequently, in strict law a littoral State can prevent such passage. They are certainly mistaken. An attempt on the part of a littoral State to prevent free navigation through the maritime belt in time of peace would meet with stern opposition on the part of all other States.

But a right of foreign States for their men-of-war to pass unhindered through the maritime belt is not generally recognized. Although many writers assert the existence of such a right, many others emphatically deny it. As a rule, however, in practice no State actually opposes in time of peace the passage of foreign men-of-war and other public vessels through its maritime belt. And it may safely be stated, first, that a usage has grown up by which such passage, if in every way inoffensive and without danger, shall not be denied in time of peace; and, secondly, that it is now a customary rule of International Law that the right of passage through such parts of the maritime belt as form part of the highways for international traffic can not be denied to foreign men-of-war.²

§ 189.—That the littoral State has exclusive jurisdiction within the belt as regards mere matters of police and control is universally recognized. Thus it can exclude foreign pilots, can make custom-house arrangements, sanitary regulations, laws concerning stranded vessels and goods, and the like. It is further agreed that foreign merchantmen casting anchor within the belt or entering a port,³ fall at once and *ipso facto* under the jurisdiction of the littoral State. But it is a moot point whether such foreign vessels as do not stay, but merely pass through the belt, are for the time being under this jurisdiction. It is for this reason that the British Territorial Waters Jurisdiction Act of 1878 (41 and 42 Vict., c. 73), which claims such jurisdiction, has called forth protests from many writers.⁴ The controversy itself can be decided only by the practice of the States. The British Act quoted, the basis of which is, in my opinion, sound and reasonable, is a powerful factor in initiating such a practice; but as yet no common practice of the States can be said to exist.

¹ Klüber, § 76; Pradier-Fodéré, II, No. 628.

² See § 449.

³ The Institute of International Law—see *Annuaire*, vol. xvii (1898), p. 273—adopted at its meeting at The Hague in 1898 a *Règlement sur le régime légal des navires et de leurs équipages dans les ports étrangers* comprising seven rules.

⁴ See Perels, pp. 69-77. The Institute of International Law, which at its meeting at Paris in 1894 adopted a body of 11 rules regarding the maritime belt, gulfs, bays, and straits, voted against the jurisdiction of a littoral State over foreign vessels merely passing through the belt. See *Annuaire*, vol. xiii, p. 328.

§190.—Different from the territorial maritime belt is the zone of the Open Sea, over which a littoral State extends the operation of its revenue and sanitary laws. The fact is that Great Britain and the United States, as well as other States, possess revenue and sanitary laws which impose certain duties not only on their own but also on such foreign vessels bound to one of their ports as are approaching, but not yet within, their territorial maritime belt.¹ Twiss and Phillimore agree that in strict law these municipal laws have no basis, since every State is by the law of nations prevented from extending its jurisdiction over the Open Sea, and that it is only the comity of nations which admits tacitly the operation of such municipal laws as long as foreign States do not object, and provided that no measure is taken within the territorial maritime belt of another nation. I doubt not that in time special arrangements will be made as regards this point by a universal international convention. But I believe that, since municipal laws of the above kind have been in existence for more than a hundred years and have not been opposed by other States, a customary rule of the law of nations may be said to exist which allows littoral States in the interest of their revenue and sanitary laws to impose certain duties on such foreign vessels bound to their ports as are approaching, although not yet within, their territorial maritime belt.

GULFS AND BAYS.

§191.—It is generally admitted that such gulfs and bays as are inclosed by the land of one and the same littoral State, and whose entrance from the sea is narrow enough to be commanded by coast batteries erected on one or both sides of the entrance, belong to the territory of the littoral State even if the entrance is wider² than 2 marine leagues, or 6 miles.

¹ See, for instance, the British so-called *Hovering Acts*, 9 Geo. II. c. 35 and 24 Geo. III. c. 47. The matter is treated by Moore, I, § 151; Taylor, § 248; Twiss, I, § 190; Phillimore, I, § 198; Halleck, I, p. 157; Stoerk in Holtzendorff, II, pp. 475–478; Perels, § 5, pp. 25–28. See also Hall, *Foreign Powers and Jurisdiction*, §§ 108 and 109, and *Annuaire*, vol. xiii (1894), pp. 135 and 141.

² I have no reason to alter the above statement, although Lord Fitzmaurice declared in the House of Lords on February 21, 1907, in the name of the British Government, that they considered such bays only to be territorial as possessed an entrance *not* wider than six miles. The future will have to show whether Great Britain and her self-governing colonies consider themselves bound by this statement. No writer of authority can be quoted in favour of it, although Walker (§ 18) and Wilson and Tucker (5th ed., 1910, § 53) state it. Westlake (vol. I, p. 187) can not be cited in favour of it, since he distinguishes between bays and gulfs in such a way as is not generally done by international lawyers, and as is certainly not recognized by geography; for the very examples which he enumerates as *gulfs* are all called *bays*—namely, those of Conception, of Cancale, of Chesapeake, and of Delaware. In the North Atlantic Coast Fisheries case, between the United States and Great Britain, which was decided by the Permanent Court of Arbitration at The Hague in 1910, the United States—see the official publication of the case, p. 136—also contended that only such bays could be considered territorial as possessed an entrance not wider than six miles, but the Court refused to agree to this contention.

Some writers maintain that gulfs and bays whose entrance is wider than 10 miles, or $3\frac{1}{2}$ marine leagues, can not belong to the territory of the littoral State, and the practice of some States accords with this opinion. But the practice of other countries, approved by many writers, goes beyond this limit. Thus Great Britain holds the Bay of Conception in Newfoundland, to be territorial, although it goes 40 miles into the land and has an entrance more than 20 miles wide. And the United States claim the Chesapeake and Delaware Bays, as well as other inlets of the same character, as territorial,¹ although many European writers oppose this claim. The Institute of International Law has voted in favor of a 12 miles wide entrance, but admits the territorial character of such gulfs and bays with a wider entrance as have been considered territorial for more than 100 years.²

As the matter stands, it is doubtful as regards many gulfs and bays whether they are territorial or not. Examples of territorial bays in Europe are: the Zuyder Zee is Dutch; the Frische Haff, the Kurische Haff, and the Bay of Stettin, in the Baltic, are German, as is also the Jade Bay, in the North Sea. The whole matter calls for an international congress to settle the question once for all which gulfs and bays are to be considered territorial. And it must be specially observed that it is hardly possible that Great Britain would still, as she formerly did for centuries, claim the territorial character of the so-called King's Chambers,³ which include portions of the sea between lines drawn from headland to headland.

§ 192.—Gulfs and bays surrounded by the land of one and the same littoral State whose entrance is so wide that it can not be commanded by coast batteries, and, further, all gulfs and bays enclosed by the land of more than one littoral State, however narrow their entrance may be, are non-territorial. They are parts of the Open Sea, the marginal belt inside the gulfs and bays excepted. They can never be appropriated, they are in time of peace and war open to vessels of all nations including men-of-war, and foreign fishing vessels cannot, therefore, be compelled to comply with municipal regulations of the littoral State concerning the mode of fishing.

An illustrative case is that of the fisheries in the Moray Firth. By article 6 of the Herring⁴ Fishery (Scotland) Act, 1889, beam and otter trawling is prohibited within certain limits of the Scotch

¹ See Taylor, § 299; Wharton, I, §§ 27 and 28; Moore, I, § 158.

² See *Annuaire*, XIII, p. 329.

³ Whereas Hall (§ 41, p. 162) says: "England would, no doubt, not attempt any longer to assert a right of property over the King's Chambers," Phillimore (I, § 200) still keeps up this claim. The attitude of the British Government in the Moray Firth Case—see below, p. 264—would seem to demonstrate that this claim is no longer upheld. See also Lawrence, § 87, and Westlake, I, p. 188.

⁴ 52 and 53 Vict., c. 23.

coast, and the Moray Firth inside a line drawn from Duncansby Head in Caithness to Rattray Point in Aberdeenshire is included in the prohibited area. In 1905, Mortensen, the captain of a Norwegian fishing vessel, but a Danish subject, was prosecuted for an offense against the above-mentioned article 6, convicted, and fined by the Sheriff Court at Dornoch, although he contended that the incriminating act was committed outside 3 miles from the coast. He appealed to the High Court of Justiciary, which,¹ however, confirmed the verdict of the Sheriff Court, correctly asserting that, whether or not the Moray Firth could be considered as a British territorial bay, the Court was bound by a British Act of Parliament even if such Act violates a rule of International Law. The British Government, while recognizing that the Scotch Courts were bound by the Act of Parliament concerned, likewise recognized that, the Moray Firth not being a British territorial bay, foreign fishing vessels could not be compelled to comply with an Act of Parliament regulating the mode of fishing in the Moray Firth outside 3 miles from the coast, and therefore remitted Mortensen's fine. To remedy the conflict between article 6 of the above-mentioned Herring Fishery (Scotland) Act, 1889, and the requirements of international law, Parliament passed the Trawling in Prohibited Areas Prevention Act,² 1909, according to which no prosecution can take place for the exercise of prohibited fishing methods outside the 3 miles from the coast, but the fish so caught may not be landed or sold in the United Kingdom.³

§ 193.—As regards navigation and fishery within territorial gulfs and bays, the same rules of the law of nations are valid as in the case of navigation and fishery within the territorial maritime belt. The right of fishery may, therefore, exclusively be reserved for subjects of the littoral State.⁴ And navigation, cabotage excepted, must be open to merchantmen of all nations, but foreign men-of-war need not be admitted.

STRAITS.

§ 194.—All straits which are so narrow as to be under the command of coast batteries erected either on one or both sides of the straits, are territorial. Therefore, straits of this kind which divide the land of one and the same State belong to the territory of such

¹ *Mortensen v. Peters*, *The Scotch Law Times Reports*, vol. 14, p. 227.

² 9 Edw. VIII, c. 8.

³ See Oppenheim in *Z. f. V.* (1911), pp. 74–95.

⁴ The Hague Convention concerning police and fishery in the North Sea, concluded on May 8, 1882, between Great Britain, Belgium, Denmark, France, Germany, and Holland reserves by its article 2 the fishery for subjects of the littoral States of such bays as have an entrance from the sea not wider than 10 miles, but reserves likewise a maritime belt of three miles to be measured from the line where the entrance is 10 miles wide. Practically the fishery is therefore reserved for subjects of the littoral State within bays with an entrance 13 miles wide. See Martens, *N. R. G.* 2nd Series, vol. ix (1884), p. 556.

State. Thus the Solent, which divides the Isle of Wight from England, is British, the Dardanelles and the Bosphorus are Turkish, and both the Kara and the Yugor Straits, which connect the Kara Sea with the Barents Sea, are Russian. On the other hand, if such narrow strait divides the land of two different States, it belongs to the territory of both, the boundary line running, failing a special treaty making another arrangement, through the mid-channel.¹ Thus the Lymoon Pass, the narrow strait which separates the British island of Hongkong from the continent, was half British and half Chinese as long as the land opposite Hongkong was Chinese territory.

It would seem that claims of States over wider straits than those which can be commanded by guns from coast batteries are no longer upheld. Thus Great Britain used formerly to claim the Narrow Seas—namely, the St. George's Channel, the Bristol Channel, the Irish Sea, and the North Channel—as territorial; and Phillimore asserts that the exclusive right of Great Britain over these Narrow Seas is uncontested. But it must be emphasized that this right is contested, and I believe that Great Britain would now no longer uphold her former claim,² at least the Territorial Waters Jurisdiction Act 1878 does not mention it.

§ 195.—All rules of the law of nations concerning navigation, fishery, and jurisdiction within the maritime belt apply likewise to navigation, fishery, and jurisdiction within straits. Foreign merchantmen, therefore, can not³ be excluded; foreign men-of-war must be admitted to such straits as form part of the highways for international traffic;⁴ the right of fishery may exclusively be reserved for subjects of the littoral State; and the latter can exercise jurisdiction over all foreign merchantmen passing through the straits. If the narrow strait divides the land of two different States, jurisdiction and fishery are reserved for each littoral State within the boundary line running through the mid-channel or otherwise as by treaty arranged.

It must, however, be stated that foreign merchantmen cannot be excluded from the passage through territorial straits only when these connect two parts of the open sea. In case a territorial strait

¹ See § 199.

² See Phillimore, I, § 189, and above, § 191 (King's Chambers). Concerning the Bristol Channel, Hall (§ 41, p. 162, note 2) remarks: "It was apparently decided by the Queen's Bench in *Reg. v. Cunningham* (Bell's "Crown Cases," 86) that the whole of the Bristol Channel between Somerset and Glamorgan is British territory; possibly, however, the Court intended to refer only to that portion of the Channel which lies within Steephelm and Flathelm." See also Westlake, I, p. 188, note 3.

³ The claim of Russia—see Waultrin in *R. G.*, vol. xv (1908), p. 410—to have a right to exclude foreign merchantmen from the passage through the Kara and the Yugor Straits is therefore unfounded. As regards the Kara Sea, see § 253, note 2.

⁴ As, for instance, the Straits of Magellan. These straits were neutralized in 1881—see § 568, and vol. II, § 72—by a treaty between Chile and Argentina. See Abribat, *Le détroit de Magellan au point de vue international* (1902); Nys, I, pp. 470–474; and Moore, I, § 184.

belonging to one and the same State connects a part of the open sea with a territorial gulf or bay, or with a territorial land-locked sea belonging to the same State—as, for instance, the Strait of Kertch¹ at present, and formerly the Bosphorus and the Dardanelles²—foreign vessels can be excluded therefrom.

ORTOLAN: Règles Internationales et Diplomatie de la Mer. Second edition. Paris, 1853.

Volume I, page 150.—The causes which interfere with the existence of the right either of property or of sovereignty are not found absolutely over all portions of the sea. There are certain parts close to the land partaking in some respects of its condition in which these causes cease more or less to exist and in which, consequently, these rights may exist in whole or in part.

In this connection, far from being exceptions to, they are confirmations of the principles which constitute the liberty of the open sea; the cause ceasing, the effect must cease.

Logically the recognition of maritime domains which are subject to the property or sovereignty of a nation is deduced from the very principles upon which the general liberty of the seas is based.

Property or domain must not be confused with sovereignty or the right of command or of jurisdiction. . . .

In this connection we must distinguish: first, ports and roadsteads; secondly, gulfs and bays; thirdly, certain straits and certain inclosed seas; fourthly, portions of the sea adjacent to the coast of the State up to a certain distance.

Ports and roadsteads are susceptible of possession and the proprietary State may use all the means incident to the right of possession. . . . This proprietorship over ports and roadsteads does not prevent other nations from freely navigating or communicating with them. . . .

The nation that is mistress of the port or roadstead may, at its pleasure, declare them closed, open, or free; that is to say, permit or forbid access to them, subject imports to certain fiscal laws, or permit free entry. Incoming ships may be subjected to such laws and regulations as it may please the State to establish. . . . Its prohibitions and permissions must merely be of a general character and common to all nations. It is within the power of the State having the sovereignty to dispose otherwise of these privileges, but

¹ See § 252.

² See § 197.

in arbitrarily excluding a certain nation it would render itself subject to legitimate and just complaints. . . .

Page 156.—In stating the reasons which justify the rights of property over ports and roadsteads, we made reservation of certain necessities of general navigation to which these rights must yield under penalty of becoming contrary to the essential purposes of the seas, to the security of communication from people to people and under penalty of losing their legitimate character. These reserves are those of the right of entry by *force majeure*; that is, in cases of *necessity*. Custom and treaties recognize this right even as to closed ports.

We must classify under the same heading as roadsteads and ports, gulfs, and bays and all other indentations known by other denominations when these indentations made in the land of a single State do not exceed in width the double range of cannon or when the entrance may be controlled by artillery or when it is naturally defended by islands, banks, or rocks. In all of these cases it may truly be said that these indentations or bays are within the power of the State which is mistress of the territory which surrounds them. This State has the possession thereof; all the reasons which we have adduced with respect to roadsteads and ports may be repeated here. . . .

Page 159.—With respect to certain interior seas the exclusive right of possession or sovereignty on the part of one nation is only incontestable to the extent that this sea is totally inclosed within its territory, forming an integral part of it and serving as a means of communication and commerce merely between the citizens of that State. Thus none of the causes which constitute an obstacle to ownership or dominion of the seas find any application, but from the moment that several different States possess the coast around this sea, no one of them can declare itself proprietor or sovereign to the exclusion of the others.

These general principles, which may serve to justify certain inadmissible or contested pretensions in the matter of straits or particular seas, are found applied more or less exactly over divers places either by custom or by international convention. Thus Denmark has exercised since time immemorial the right of exclusive surveillance over the Sound and the Great and Little Belt.

Page 163.—According to Martens,¹ who sums up the situation with respect to the principal gulfs and straits of Europe, exclusive right is not contested in the following cases: first, of Great Britain over St. Georges Channel; secondly, of the King of Denmark over the Great and Little Belt and over the Sound; thirdly, of the Turks over the Archipelago and over the sea of Marmora and over the straits which lead to the Black Sea; fourthly, of the King of Naples since

¹ Book 2, chap 1, sec. 42.

1815 over the Straits of Messina; fifthly, of Holland over the Zuyder Zee; sixthly, of the King of Sweden over the Gulf of Finland.

In spite of this high authority, we are far from admitting this assertion in all these points. Thus Pinheiro-Ferreira says with reason in his excellent notes that the Sound and Straits of Messina and those which form communication between the Black Sea and the Mediterranean Sea can not be placed in the same class as St. Georges Channel, the Zuyder Zee, and even the Gulf of Finland; that the use of the first could not be disputed to any nation by the people situated along their shores, because all are interested in enjoying it. As to the Archipelago, if it could be the object of the exclusive claims of Turkey, whose pretensions have never been set up *de jure*, it is no longer even possible that they subsist since the emancipation of Greece and its erection into an independent kingdom.

Finally, with respect to the Gulf of Finland, it is true that before the cession of this province to Russia, Sweden possessed it uncontested; although to-day, according to Mr. Schmalz, it has not yet been decided to whom it belongs. It seems to us that if it should be the individual property of one State, this can only be Russia.

The security of a State and regard for its own defense make it a necessity to watch over its frontiers. In virtue of its right of absolute independence it may regulate, at its pleasure, the matter of allowing foreigners admission into its territory. Maritime frontiers by their nature are susceptible of an unforeseen attack and unforeseen invasion, and contraband and fraudulent commerce can be organized along them on a large scale. A nation should, then, exercise the most extended surveillance over vessels of all kinds which endeavor clandestinely to approach its coast and even those which come too near.

The border of the sea which washes the coast of a State constitutes the natural maritime limits to that State, but for the protection and most effective defense of these natural limits the general custom of nations in accordance with public treaties, permits imaginary lines to be traced along the coast at a suitable distance following its sinuosities, which may be considered as the artificial maritime boundary. Every ship which finds itself inside of this line is said to be *in the waters* of the State whose right of sovereignty and jurisdiction it limits.

Pinheiro-Ferreira calls this imaginary line "the line of respect," within which, he says with reason, "the alien, even in the absence of force, must conduct himself as if he were upon the territory of the State, and undertake nothing which the government of that State would have the right to pronounce as infringing upon the ownership or security of the nation."

Every kind of sea embraced between this line and the coast bears the name *territorial sea*.

Its extension is not fixed uniformly. Authors of international law differ as to this question, but the greatest number, especially among the modern writers, limit it generally to the greatest range of cannon placed upon shore.¹ They themselves object to the opinion of Grotius and Bynkershoek, who embrace within the territory of a nation all the extent of sea which may be defended from the land.²

Page 168.—It matters little that the bottom of the sea is the geological prolongation, more or less recognizable, of the coast. The moment we reach sea whose depth is sufficient for navigation we have the means of communication, subject to international law, of which all peoples may make use and which can not be legitimately denied to them, according to the principles which we have already explained. If an adjacent State may forbid access to its ports, except in cases of necessity, it could not prevent navigation within sight of its territory. It can not claim or declare the closure of the territorial sea as it would declare the closure of one of its ports, or impose a toll or duty upon the ships which pass, as if they were passing in water which belonged to it, except in the case of works or special aids to navigation, whose establishment and maintenance in these localities are required in the interests of general navigation, and for which these duties serve as a legitimate indemnity. To act against these rules would be to violate the essential purposes of the sea or to derive a profit due to no one in particular. Even though it had the means, it would not be legal to exercise them. The obstacle of universal reason always exists; thus the right over the territorial sea is not one of property.

Since, on the one hand, the power of each nation over the adjacent sea is based upon its right of defense, it ought not to extend beyond the point where serious fears of attack or danger commence; and since, on the other hand, this power embraces rigid surveillance and even the employment of force, it ought not to extend beyond the point that this force can reach. That is, having in view actual attack or possible defense, we ought to consider only that portion of territorial sea as subject to the entire control of the adjacent State which may be dominated by instruments of action erected upon the coast or which may threaten the coast by instruments placed in that portion of the sea. The greatest range of cannon, according to the ordinary progress of the art at each epoch, is therefore the best universal measure to adopt. There is no question that the measurement of the distance commences at the point where there is actual navigable sea.

¹ Citing Vattel, Azuni, Klüber, and Martens.

² Citing Grotius, book 2, chap. 3, secs. 13 and 14, and Bynkershoek, *De Domino Maris*.

The rule which Bynkershoek gives—*terræ potestas finitur ubi finitur armorum vis*—is to-day the rule of the law of nations, and since the invention of firearms this distance has ordinarily been considered as 3 miles.

Nevertheless, with respect to this limitation of the territorial sea, two observations may be made: First, the greatest range of cannon is the common standard of measurement adopted by the universal law of nations, which must be observed by all in the absence of treaty; but nothing would prevent certain Powers from agreeing among themselves, by treaty, upon a different extent of the territorial sea. The extension thus established would, however, be obligatory only on the contracting Powers, other Powers remaining subject to the common rule. Our opinion, moreover, is that these special treaties, while substituting a more definite measurement in precise figures for that of the range of cannon, ought not to digress far from this latter standard, the danger being of opposing the principles of reason upon which the special control over the territorial sea is based.

The second observation is that heretofore we have spoken of this control only in considering it in its entirety and in all its consequences as inducing the application of the entire sovereignty of the adjacent State, even of its laws and safety and its general jurisdiction. It is to this collectivity of consequences, to this generalized sovereignty, that we must rigorously apply what we have said about the territorial sea and of the extent it ought to cover. It is to this complete control that the domination of the territorial sea expressly corresponds, and the ordinary limit is the greatest range of cannon shot.

But considered as a whole, there are certain points of detail which deserve special attention and which may involve by their nature special regulations; such are principally the provisions established in order to prevent infringement in matters of commerce or to protect the coastal fishing, which, in the absence of special conventions, is to be reserved for nationals.

On these particular points and other similar ones, treaties between nations are frequently concluded and different distances, even greater than the range of cannon, are agreed upon. The rule in all these cases ought always to be that the distance thus agreed upon is obligatory even between the contracting parties only for the object in view of which it was established; and that for all others, if there are no special regulations, we must recur to the common standard of measurement and to general principles governing the territorial sea.

Thus neighboring States between whom contests with respect to littoral fishing may be raised are accustomed to fix their reciprocal rights by treaties, and in such a convention recently concluded between France and Great Britain the distance for the limit of the ex-

clusive right of fishing on the respective coasts of the two countries was fixed at 3 miles from low-water mark.¹

As to the measures to be usually taken and the laws and regulations to be observed with respect to commerce, even if they are at times the object of treaties between nations, they are more often and in full right fixed by the government alone which possesses sovereignty over the territorial sea.

Commercial nations are deemed to know them and are bound to observe them.

Great Britain, on August 28, 1833, established certain regulations for merchant vessels coming within a league of the shore. In war times a great number of treaties provide for the strict observance of neutrality upon the waters of the neutral nation; but in this matter, although the principle of the respect due to territorial waters is recognized by all treaties, these treaties do not agree so thoroughly upon the extent to be given to these seas. Generally it is fixed at from 2 to 3 leagues, others limit it to the range of cannon shot, while those concluded with the Barbary Powers extended it up to 10 leagues.

PERELS: *Manuel de Droit Maritime International.* Translated into French by L. Arendt. Paris, 1884.

§ 5, page 24.—*National waters.*—The principle of the liberty of the seas is subject to several restrictions, some in the interests of maritime relations in general, others in the interests of diverse people who participate in these relations. Among the first there may be cited the obligations imposed upon ships to prove their nationality; regulations intended to avoid collisions at sea; those which relate to visit and search, etc. The institutions and rules which have been recognized as necessary from this point of view to assure protection to vessels are not restrictions upon the free use of the sea, but measures intended to maintain for all time the free and peaceable enjoyment of the greater part of the face of the globe.

It is otherwise with restrictions of the second kind, those special rights which the maritime law of nations concedes to all maritime States, or to some among them over certain parts of the ocean and over special seas. These rights will be treated hereafter.

(A) *The territorial sea.*—The territorial sea, or maritime territory (*Küstenmeer* or *Territorialmeer*, in German), is that part of the sea which extends from the coast a certain distance out. It is regarded as the national domain of the State whose coasts it washes, and by a fiction it is considered as a continuation of the land territory. This

¹ Convention of August 2, 1839.

is justified by the following reasons: (a) because it is possible and necessary for the security of a State to protect the freedom of the national territory by taking exclusive possession of the coast for a certain distance seawards; (b) because it is necessary, from the point of view of the political, commercial, and fiscal interests of the country, and to assure a sufficient police, to watch over the ships which enter this part of the sea, those which leave it, and those which anchor in it; (c) finally, and not one of the least of the reasons, because this restriction is indispensable to assure the subsistence of the greater number of the inhabitants of the coast.

Hautefeuille¹ says in this connection:

To admit the liberty of the territorial seas would be to annihilate the basis of international commerce and to deprive the majority of the maritime States of the immense advantages which they derive from their commerce. Thus, all the treaties, without exception, having commercial interests as their subject, have recognized upon the part of nations the right of legislating upon all the territorial seas which wash their coasts—that is, they have sanctioned the sovereign domain of the State over this part of the ocean. This exception to the general principle of the liberty of the seas does not infringe the general principle itself; the use of the ocean for navigation and fishing on the high seas remains free and common to all. Everyone may advance unrestricted into the farthest regions and carry on commerce with all peoples; everyone may, unrestricted, pursue fish whose habitation is far from the coasts. The ocean, therefore, is free, but the narrow space which washes the shore is reserved to the State. It is property of the sovereign of the State who can exclude all others from it; it is not free.

No right of property, *dominium*, such as is ascribed to the State over the shore itself, is claimed over the territorial sea thus reserved. *Imperium* is here in question and as a consequence the right of disposing, excluding, and accomplishing other acts of a diverse nature. The decree of the supreme court of Prussia of November 28, 1866, is thus worded: "Riparian States have only the faculty of taking measures in the interest of protecting navigation and commerce, and it is from this point of view only that international law admits the necessary extension of the territorial sea to the range of cannon shot."

To fix the limits of the territorial sea it is first necessary to discuss two questions. Where does the territorial sea commence, starting from the shore, and, secondly, how far does it extend, starting from the line at which it commenced?

(a) *Limit of the coast line*.—The natural extent between the coast and the territorial sea, even leaving out of account alluvions and en-

¹ *Droits et devoirs*, vol. 1, p. 232.

croachments of water which we need not consider here, can never be permanent. It varies according to the tides, winds, and currents. If it is desired to fix it so as to draw legal conclusions from it, it does not suffice merely to say that the coast line commences on the shore. Whilst Roman law determines this line from high-water mark, the recent sources of international law, and particularly the conventions relative to fishing, take low-water mark as the line of departure. The publicists, in so far as they have endeavored to throw light on this question, in general, adopt the same rule. According to some, however, the line must be fixed with regard to the state of the tides at each particular occasion, so that a capture made at the outer extremity of the territorial sea, for example, might be judged differently at high-tide and at low tide.¹ It is evident that this opinion is nugatory. Others, again, place the limit where the sea commences to be navigable,² but no reasoning can be found to support this solution of the question.

The entire question is in close relation with that of the extent of the territorial sea measured from the open sea landwards. The problem solves itself, if this latter limit is not fixed at a definite distance, always the same, from the coast or if it is made to depend upon the possibility of dominating the narrowest portion of the sea from the shore. We shall see that this point of departure is the only satisfactory one. If it is admitted, we shall find that the limit of the territorial sea ought to be the line at which at all times this *imperium* can be exercised in fact. It is within a line drawn from that point of the coast where batteries can be erected whose position is not threatened by high tide under the most violent action of the waves. We need not, however, take into account extraordinary tides, which it is impossible to foresee, for example, those of November, 1873, in the Baltic. It matters little whether these batteries be actually erected. It suffices that there be a possibility of constructing them.

But if international treaties declare that low-water mark shall serve as the limit of territory, this stipulation must be respected, and the high sea must not be taken as the limit in those matters which these treaties regulate. It must be remarked that this delimitation, although it is not rational, has been recently admitted in the British Territorial Waters Jurisdiction Act of 1878, and if it has not its origin in practical considerations, it is none the less applied in particular cases.

(b) *Limit of the territorial sea.*—This is determined, either in an irrevocable manner by fixing it at a certain distance, which does not change, or else by taking account of the possibility of dominating the sea from the shore. Practice like theory has often confused the two

¹ Jacobson, pp. 580, 585.

² Wheaton, *Elements*, vol. 1, p. 168.

standards of delimitation; and among the most recent treaties are found some which contain very hazy ideas as a result of an effort to avoid the confusion to which we have here called attention. However, the solution does not offer serious difficulties if we stand strictly on this only exact foundation; that is to say, the possibility of exercising on the shore the *imperium* which ought to extend to the sea, and taking the necessary measures of protection continuously and uninterruptedly.

The other reasons which are alleged to justify this appropriation of the territorial sea are not of such a nature as to give a very satisfactory explanation, but in maintaining our point of view, we naturally arrive at the consequence that the limits of the territorial sea are marked by the extreme line to which one may extend, from the shore line, protection over the water.

The extent of the territorial sea is therefore fixed according to the cannon range of each epoch; but in each epoch it is the same for all seas, for the matter can not depend upon each particular country's establishing batteries upon its coast. When a coast is very extensive there can, in fact, be only a few points which need thus be armed, nor can it be modified according as a State does or does not possess cannons of long range. We need only consider the *possibility* of placing such cannon on the coast.

In adopting a fixed and invariable distance, the authors have not acted quite arbitrarily. They desire to fix a distance common to all the States, or else indicate merely the limit which, placing a limitation upon excess of pretensions, ought to serve certain definite States in the execution of legislative acts or international treaties. But those among the authors who declare that the territorial sea extends to the range of cannon, *or* 3 miles from the coast, do not explain themselves on the relation which they establish between these two terms, and they leave one to suppose that, according to an international agreement, express or tacit, which is obligatory upon all, or else according to constant practice, the range of cannon has been fixed at that distance, so far as concerns maritime international law.

German publicists, and the majority of French and Italian, have not fallen into this error.¹ The identification of the distance of 3

¹ Bluntschli distinguishes clearly (art. 382) the general limit determined by the range of cannon and the limit of three miles fixed by particular acts; likewise Heffter (sec. 75) whilst Geffcken (note on sec. 75) says, without too much reason:

"The range of cannon being greatly perfected it is generally admitted that the public domain extends to three miles."

See also Klüber (sec. 130), Oppenheim (p. 128), Goldammer (*Archives*, vol. 3, p. 651, *et seq.*) See for the practice, a decision of the Supreme Court of Prussia November 28, 1866 (*ibid.*), vol. 16, p. 77-79; Gessner, *Droits des neutres* (p. 22-23) establishes that the principle posited by Bynkershoek is generally adopted, and says: "This is why the rights of the bordering State have been augmented by the invention of rifled cannon," and he adds, "previously one had as a rule fixed the extent at two miles. To-day, we ordinarily take as a basis a distance of three miles." Among the French we may cite

miles with the range of cannon has only been arrived at after a series of generalizations upon acts and writings which have decided certain special questions. It was not possible to draw from these facts a reason based upon *naturalis ratio*. As we may see from the declaration made by the government in the discussion of the Territorial Waters Bill in the House of Lords, February 14, 1878, the recent English practice has aligned itself with the system of those who identify the two standards of measurement, and this point of view has been adopted by the English and American publicists.

Other measures proposed to determine the extent of the territorial sea, such as the range of the human voice measured out from the shore, the depth of the water, two days' voyage, etc., do not warrant being discussed. We can not, however, terminate our observations on this subject without saying that in our day there are still some publicists who extend the limit of the territorial sea at times far beyond the pretensions of the most radical writers of the middle ages. They align themselves with the doctrine of Vattel; the latter recognizes, it is true, that according to the law of nations of his time, the sea can not be regarded as a continuance of the land except as far as a cannon shot from the shore; but, further, he states the principle that the power of a State generally extends over the bordering waters, as far as its security requires it and its strength permits. . . .

Great Britain arrogates to itself in the interest of customs administration, the right of surveillance exercised by revenue cutters, up to 4 leagues (12 miles). She claims the right of stopping and visiting all ships which steer toward British ports and are found within this limit. In case of contraband or fraud, she reserves the right to seize and impose judgment upon the guilty ship, by the British court. (Hovering Acts.) Kent claims the same rights for the United States; he claims the character of neutrality for the bordering sea up to that distance. Similar pretensions have found their origin in the particular interests of each State and do not take account of the law of nations, in view of which, no State may, in time of peace, exercise the right to arrest foreign ships beyond the normal limit; that is, beyond the cannon range. One can not hope, reasonably, to have these claims recognized by third States.

Every State whose flag has been the object of such an order of arrest can protest and, according to the circumstances of the case, claim an indemnity for the injury. By the terms of the British law (26 George II), British ships coming from infected ports must

above all, Ortolan (vol. 1, pp. 158, 159); amongst the Italian, Schiaratella (*Del Territorio*, p. 8) holding that the greatest range of cannon is the true and only rational basis. Among the older publicists there may be mentioned Surland (sec. 483) and G. F. von Martens (*Précis*, vol. 1, pp. 141, 142, 309).

hoist a quarantine signal when they meet other ships within 4 leagues of the British coast under penalty of £200 fine. Although this law is of indisputable utility from the sanitary point of view, in general, it is not obligatory on foreign ships within such a distance of the coast. It is within the power of the State whose flag has been the object of the execution of this measure to judge as to whether they shall make a claim or not.

Hautefeuille justly rejects these attempts at domination:

The extent of the territorial sea has been much discussed. Even to-day some nations so extend it that it becomes the annihilation of the principle of the liberty of the sea. The definition of the territorial sea sufficed to fix its extent. Maritime waters become territorial only when they can be defended by the sovereign from the coast in an absolute and permanent manner. It is only those, therefore, absolutely within this power which acquire such character. The actual extent of the defensive power is the limit of the private sea. The majority of sovereign people have adopted this limit. They regard as territorial all that part of the sea comprised within the greatest range of a cannon placed on shore; all claims made by certain nations beyond that limit are illegitimate pretensions which can not be justified.

The limit of 3 miles has a great importance. By miles we mean nautical miles, 60 to a degree, of which 4 make a geographical mile and 3 a marine league. This limit is found in numerous treaties, notably in fishery conventions, in laws regulating declarations of neutrality, and in other acts of divers governments.

Its origin must be sought during the time in which 3 nautical miles was regarded as a limit of the range of cannon. It is undoubtedly true that these national arrangements are obligatory upon those who have concluded them; provisions of law which have the character of municipal regulations and extend the limit of the territorial sea beyond that established by international law need not be recognized by foreign States beyond the accepted limit. The limit based upon the range of cannon is not definitely fixed but it is dependent upon the greatest range of the best cannon. Cannons of great vessels and those of coast batteries carry to-day to a distance of about 8 nautical miles.

Page 42.—(d) Great Bays or Gulfs.—We now undertake to discuss the claims of certain States to rights of dominion over great bays and gulfs. Such pretensions have at times been recognized expressly or tacitly, but they have been combated much more frequently. There can never be any right of property in these parts of the sea. We may cite:

1. Bays whose width is 10 miles or less (one-sixth of a degree) reckoning from the extreme point of the land or sand banks. This delimitation is voiced for the first time in Article 9, of the Anglo-

French treaty of August 2, 1839, concerning fisheries on the English Channel. It has thence passed into a number of conventions and decrees concerning the authorization of fishing in national waters. The British Board of Trade has likewise recognized, by a notice of November, 1868, the fishing limits fixed by the North German Confederation for the German coasts. The exclusive right of fishing is always reserved to German fishermen "in the interior of bays or curvatures of the coast, having a width of 10 miles or less reckoning from the extreme points of the land and sand banks." In this case and in other similar ones there is no question of the right of property but merely of an exclusive right in favor of the national fishing, accorded in order to prevent trouble in the pursuit of this industry and enforced by a maritime police with the assistance of naval vessels. Thus, the German navy has frequently protected German fishermen on the coasts of the North Sea against the encroachment of the British and Dutch fishermen.

2. The pretensions of Great Britain concerning the extension of her territorial sovereignty over the wide bays, gulfs, and straits which surround Great Britain and Ireland—that is, the seas called the "narrow seas" and "adjoining seas"—have never been universally admitted and if in certain cases the force of circumstances has permitted these claims to be asserted without contradiction we can not deduce from this fact that they are well founded. The unilateral exercise of pretended rights, even when they do not evoke counterclaims from other States either from connivance or inability to resist, can never be asserted against those who have not acquiesced expressly or by acts of unmistakable import.

Phillimore says, it is true, "the exclusive right of the British Crown to the Bristol Channel between Ireland and Great Britain (*Mare Hibernicum*, St. Georges Channel) and to the channel between Scotland and Ireland is uncontested," but we must say that this pretended exclusive right is not admitted without contradiction, except by British publicists. Others refuse to recognize it. Woolsey says, section 60:

Great Britain long claimed supremacy in the narrow seas adjoining that island. But the claim, also chiefly satisfied by paying certain honors to the British flag, was not uniformly acquiesced in, and has fallen into desuetude. And if it had been urged and admitted in former times, the force of the prescription would be broken by the plea that the views of the world in regard to the freedom of commerce have become much more enlarged.

Besides the waters that we have just cited—that is, the Bristol Channel, St. George's Channel, St. Patrick's Channel, and the Irish Sea—Great Britain has claimed sovereignty of the same kind, and particularly a right of jurisdiction, over the encroachments of the

sea into the land; that is, over all the waters comprised within a line drawn between two headlands. These inward encroachments of the sea are called Kings chambers. The United States has arrogated to itself similar rights over the great bays of the coast of the United States; thus, in 1793 it claimed the right of property over Delaware Bay. Kent supports these claims. Wheaton¹ likewise admits, as fixed by usage, the right of jurisdiction of the British Crown over these waters. He forgets that such an exclusive right can never, in any way, be acquired by merely taking possession.

In this domain the exercise of certain maritime police powers, whose aim was the security of intercourse, has frequently been confounded with the right of sovereignty and jurisdictional power flowing from it. Modern publicists are less disposed than older ones to recognize this right of sovereignty, and it would be difficult to adduce proofs for the support of the assertion of Twiss, according to whom international law would classify these bays and parts of the sea according to the number of zones in which hostilities may be undertaken in times of war. It is very remarkable and characteristic of the recent doctrine of England that the Territorial Waters Jurisdiction Act limits to 3 miles the extent of the right of jurisdiction over the territorial sea. The explanations which were given upon this point in discussing the bill in the House of Lords prove that the British Government has deemed it inadvisable to contest modern ideas on the liberty of the sea in claiming the right of jurisdiction to such a wide extent. . . .

PHILLIMORE: Commentaries upon International Law. Third edition, London, 1879.

Volume I, page 247.—CLXXII. The question, whether the *open sea*, or *main ocean*, could be appropriated² by any State to the exclusion of others, has been the subject of celebrated controversies. Spain and Portugal, at different epochs, have claimed exclusive right, founded upon the titles of previous discovery, possession, and Papal grants, to the navigation, commerce, and fisheries of the Atlantic and Pacific Oceans. The *Mare Liberum*,³ written by Grotius in 1609, the

¹ *Elements*, vol. 1, p. 170.

² *Aldericus Gentilis*, lib. 1, c. viii. *Advocationes Hispanicae*, maintains (in 1613) the claim of Great Britain to the Narrow Seas.
Wheaton, *Law of Nations*, vol. 1, pp. 225-9.

Vattel, lib. 1, c. xxiii.

Martens, lib. ii, c. 1, s. 43. *De l'Océan*, lib. iv, c. iv, s. 157, *Droits sur l'Océan et sur la mer des Indes*.

Günther, II, p. 28.

³ A noble work, which can not now be read without profit to the reader and admiration for the writer. It was dedicated "Ad Principes Populosque liberos Orbis Christiani."

chief object of which was to demonstrate the injustice of the Portuguese pretensions, founded on their discovery of the Cape of Good Hope, to the exclusive navigation of the African and the Indian seas, the *Mare Clausum*, written by our own countryman Selden, to establish the exclusive right of Great Britain to the British seas, Pufendorf, in the fifth chapter of his fourth book, *De Jure Naturali Gentium*, and the essay of Bynkershoek in 1702, *De Dominio Maris*, have exhausted this theme.¹ It is sufficient to say, that the reason of the thing, the preponderance of authority, and the practice of nations, have decided, that the *main ocean*, inasmuch as it is the necessary highway of all nations, and is from its nature incapable of being continuously possessed, cannot be the property of any one State. "Igitur quicquid dicat Titius, quicquid Maevius, ex possessione jure naturali et gentium suspenditur dominium, nisi pacta dominium, citra possessionem, defendant, ut defendit jus cujusque civitatis proprium."² It is possible, as is indeed apparent from this citation, that a nation may acquire exclusive right of *navigation* and *fishing* of the main ocean *as against another nation*, by virtue of the specific provisions of a treaty; for it is competent to a nation to renounce a portion of its rights; and there have been instances of such renunciation, both in ancient and modern times.

CLXXIII. The treaty of peace, justly called "famous" by Demosthenes³ and Plutarch,⁴ whereby the Athenians extorted from the Persians a pledge that they would not approach the Greek sea within the space of a day's journey on horseback, and that no ship of war should sail between Cyanean and Chelidonian isles; the treaties whereby the Carthaginians bound the Romans not to navigate the Mediterranean beyond a certain point, and whereby the Romans imposed restrictions of the like kind upon the Illyrians, and on King Antiochus; there are memorable examples of the voluntary resignation of a nation's intrinsic rights.

So, in modern times, the House of Austria⁵ has renounced, in favor both of the English and Dutch, her right to send ships from the Belgic Provinces to the East Indies; and the Dutch attempted to interdict Spanish ships, sailing to the Philippine Islands, from doubling the Cape of Good Hope.

¹ When the Spanish envoy, Mendoza, complained to the Queen Elizabeth that English ships presumed to trade in the Indian Seas, that queen gave for answer, "That she saw no reason that could exclude her or other nations from navigating to the Indies, since she did not acknowledge any prerogative that Spain might claim to that effect, and much less any right in it to prescribe laws to those who owed it no obedience or to debar them trade. That the English navigated on the ocean, the use of which was like that of the air, common to all men, and which, by the very nature of it, could not fall within the possession or property of any one." *Camd. in Vita Elizabeth, ad ann. 1580, p. m. 328 et seq.*

² Bynkershoek, *Opera*, vol. vi, p. 361.

³ Demosthenes, *Oratio de falsa legatione*.

⁴ Plutarch, *Vita Cimonis*. Grotius, l. ii, c. iii, s. 15. Vattel, l. i, c. xxiii, s. 284.

⁵ *Traité de Vienne*, 16 mars 1731, art. 5.

CLXXIV. Instances of this kind, however, are far from proving that the main ocean is capable of becoming property. "Possunt enim ut singuli" (Grotius truly remarks) "ita et populi pactis, non tantum de jure quod proprie sibi competit, sed et de eo quod cum omnibus hominibus commune habent, in gratiam ejus cujus id interest decedere."¹ He illustrates this position, according to his wont, by a reference to the Roman Law. A person sold his maritime farm with the condition that the purchaser should not fish for *thunnies* to the prejudice of another maritime farm, which the seller retained in his possession. Upon this case Ulpian gave his opinion that, although the sea belong to the class of things which could not be subjected to a *servitus*² of this kind, yet the *bona fides* of the contract required that the restriction should be binding against the purchaser, and those who succeeded to his rights and estates.

The right of navigation, fishing, and the like, upon the open sea, being *jura merae facultatis*, rights which do not require a continuous exercise to maintain their validity, but which may or may not be exercised according to the free will and pleasure of those entitled to them, can neither be lost by *non-user* or *prescribed against*, nor acquired to the exclusion of others by having been immemorially exercised by one nation only. No presumption can arise that those who have not hitherto exercised such rights have abandoned the intention of ever doing so.³

CLXXV. But though no presumption can arise, it is the opinion of Vattel—who holds most explicitly, in more than one part of his work, the doctrine which has just been laid down—that such non-user on the part of other nations may possibly, under certain circumstances, become clothed with the character of a *tacit consent and convention*, which may found a title in one nation to exercise such rights to the exclusion of others.

Qu'une nation en possession de la navigation et de la pêche en certains parages y prétende un droit exclusif, et défende à d'autres d'y prendre part; si celles-ci obéissent à cette défense, avec des marques suffisantes d'acquiescement, elles renoncent tacitement à leur droit en faveur de celle-là, et lui en établissent un, qu'elle peut légitimement soutenir contre elles dans la suite, surtout lorsqu'il est confirmé par un long usage.⁴

¹ Grotius, l. ii, c. iii, s. 15. Vattel, l. i, c. xxiii, s. 284.

² *Dig.* l. viii, t. iv, leg. 13.

³ Vattel, l. i, c. viii, s. 95; Lib. i, c. xxiii, s. 285-6. Pufendorf, *Jur. Nat. et Gent.*, l. iv, c. v, s. 5. Heffter, s. 74.

Wheaton, *Elements*, vol. i, p. 228: "The authority of Vattel would be full and explicit to the same purpose, were it not weakened by the concession, that though the exclusive right of navigation or fishery in the sea cannot be claimed by one nation on the ground of immemorial use, nor lost to others by nonuser on the principle of prescription, yet it may be thus established where the nonuser assumes the nature of a consent or tacit agreement, and thus becomes a title in favor of one nation against another."

⁴ *Annual Register*, vol. 32, 1790.

CLXXVI. Mr. Wheaton does not appear to agree with the qualification of the doctrine contained in the passage just cited; but the reasoning of Vattel does not seem to be unsound: the case for its application is not often likely to occur.

CLXXVII. In 1790, May 25,¹ Lord Grenville vindicated the British *dominium* over Nootka Sound against the Spaniards. In a message laid before both Houses of Parliament it was said that:

His Majesty has received information, that two vessels belonging to his Majesty's subjects, and navigated under the British flag; and two others, of which the description is not hitherto sufficiently ascertained, have been captured at Nootka Sound, on the North-western coast of America, by an officer commanding two Spanish ships of war; that the cargoes of the British vessels have been seized, and that their officers and crews have been sent as prisoners to a Spanish port.

The capture of one of these vessels had before been notified by the Ambassador of his Catholic Majesty by order of his Court, who, at the same time, desired that measures might be taken for preventing his Majesty's subjects from frequenting those coasts which were alleged to have been previously occupied and frequented by the subjects of Spain. Complaints were also made of the fisheries carried on by his Majesty's subjects in the seas adjoining to the Spanish continent, as being contrary to the rights of the Crown of Spain. In consequence of this communication, a demand was made, by his Majesty's order, for adequate satisfaction, and for the restitution of the vessel previous to any other discussion.

By the answer from the Court of Spain it appears that this vessel and her crew had been set at liberty by the Viceroy of Mexico; but this is represented to have been done by him on the supposition that nothing but the ignorance of the rights of Spain encouraged the individuals of other nations to come to those coasts for the purpose of making establishments, or carrying on trade; and in conformity to his previous instructions, requiring him to show all possible regard to the British nation.

No satisfaction is made or offered, and a direct claim is asserted by the Court of Spain to the exclusive rights of sovereignty, navigation, and commerce in the territories, coasts, and seas in that part of the world.

His Majesty has now directed his minister at Madrid to make a fresh representation on this subject, and to claim such full and adequate satisfaction as the nature of the case evidently requires. And, under these circumstances, his Majesty, having also received information that considerable armaments are carrying on in the ports of Spain, has judged it indispensably necessary to give orders for making such preparations as may put it in his Majesty's power to act with vigour and effect in support of the honour of his Crown and the interests of his people. And his Majesty recommends it to his faithful Commons, on whose zeal and public spirit he

¹ Vattel, *Le droit des gens*, vol. 1, l. 1, c. xxiii, s. 286.

has the most perfect reliance, to enable him to take such measures, and to make such augmentation of his forces, as may be eventually necessary for this purpose.

It is his Majesty's earnest wish, that the justice of his Majesty's demands may ensure, from the wisdom and equity of his Catholic Majesty, the satisfaction which is so unquestionably due; and that this affair may be terminated in such a manner as to prevent any grounds of misunderstanding in future, and to continue and confirm that harmony and friendship which has so happily subsisted between the two Courts, and which his Majesty will always endeavor to maintain and improve by all such means as are consistent with the dignity of his Majesty's Crown and the essential interests of his subjects.

The dispute was terminated by the Nootka Sound Convention, the importance of which was much insisted upon in the discussions between Great Britain and the North American United States relative to the question of the Oregon boundary.

CLXXVIII. Upon April 17, 1824,¹ a Convention was entered into at St. Petersburg, between the United States of America and Russia, respecting the navigation of the Pacific Ocean, and the forming of settlements upon the north-western shores of America. By this Convention it was agreed generally, that the subjects of both countries might freely navigate the Pacific, or South Sea, occupy shores as yet unoccupied, and enter into commerce with the native inhabitants; and it was stipulated that for the future it should be unlawful for the subjects of the United States to make any settlement on the north-west coast of America, or of the adjacent isles, "*au nord du cinquante-quatrième degré et quarante minutes de latitude septentrionale*;" and for any subjects of Russia to make any settlement "*au sud le la même parallèle*."² This Convention therefore restricted the natural rights of these two countries; but it could not extend beyond them, or have any effect, *per se*, upon other countries.

CLXXIX. Denmark³ has not always confined her pretensions of sovereignty to the narrow sea of the Baltic, but has also extended them to the open North Sea.⁴ Queen Elizabeth complained, in a letter which she wrote to the King of Denmark, in 1600, of the manner in which British vessels were prevented from fishing in this sea, maintaining their right to do so as resting upon an undoubted principle of law.⁵

At a very early period Denmark considered herself entitled to the sovereignty or *dominium* over the whole Sound, and always founded

¹ Ratified Jan. 11, 1825.

² Martens and de Cussy, *Recueil de traités*, vol. iii, p. 659.

³ Schlegel, *Staatesrecht Dänemarks*.

⁴ See *post.* § clxxxix.

⁵ Rymer, *Foed.*, vol. xvi, p. 395; "A Regina ad Regem Daniæ; super Piscatione in Alfo Mari permittenda."

her right to Sound dues not only on the Treaties concluded with several States, but also and principally upon this *dominium*.

It was as a recognition of this *dominium* that Denmark exacted a salute to Kronborg from every man-of-war passing through the Sound as well as when they went along the Swedish as when they went along the Danish coast. The salute was given by Swedish men-of-war, even after Sweden had by the peace of Copenhagen not only gained possession of Scania, but also been exempted from the payment of Sound dues. This last advantage, however, was lost to her in 1720.

After the peace of Copenhagen, 1660, Denmark never claimed possession of the whole of the Sound, but admitted that Sweden, with the exception of the duty to salute Kronborg, possessed the *jus littoris*, that is, the *dominium* over the sea near the coast of Scania.

Since the Treaty of 1857, it has become a question of purely historical interest, how far and how long the *dominium* of Denmark was recognized by other States. I incline, however, to believe that the supremacy claimed by Denmark over the Sound and the two Belts, through which the Baltic Sea finds its way into the ocean, was founded upon the valid international title of immemorial prescription confirmed by many treaties with various Maritime States. The dues, however, which Denmark levied upon ships passing these straits had long been the object of much complaint and the cause of much irritation to foreign States, and had become in fact very injurious to trade, owing to the detention of vessels which the collection of these dues occasioned. In 1857 the whole subject was happily adjusted by treaty with the Great European Powers. The right of Denmark to levy these dues was not distinctly recognized, but compensation was made to her by payment of a capital sum¹ on the ground of indemnity for maintaining lights and buoys, which Denmark stipulated to maintain and to levy no further duties. The United States declined to take any part in this European Convention for what President Pierce considered "the most cogent reasons." He stated—

One is, that Denmark does not offer to submit to the Convention the question of her right to levy the Sound dues. A second is, that if the Convention were allowed to take cognizance of that particular question, still it would not be competent to deal with the great international principle involved, which affects the right in other cases of navigation and commercial freedom, as well as that of access to the Baltic. Above all, by the express terms of the proposition, it is contemplated that the consideration of the Sound dues shall be commingled with and made subordinate to a matter wholly extraneous—the balance of power among the Governments of Europe. While, however, rejecting this proposition, and insisting on the right

¹ The sum paid by Great Britain was a million and a quarter.

of free transit into and from the Baltic, I have expressed to Denmark a willingness on the part of the United States to share liberally with other Powers in compensating her for any advantages which commerce shall hereafter derive from expenditures made by her for the improvement and safety of the navigation of the Sound or Belts.¹

Accordingly a separate Treaty was made between the United States and Denmark, April 11, 1857, by which Denmark declared the Baltic open to American vessels, and stipulated to maintain buoys and lights and furnish pilots, if desired, for which she received a certain sum of money.

Since the making of these Treaties it would be difficult to maintain that Denmark now possesses any other dominion over the Sound than that which every State possesses over the sea along its coasts. The Declaration of August 15, 1873, was apparently only intended to regulate pilotage, and the statement in Article IV. of the Declaration, that it does not in the least put any restrictions on the dominion over the sea near the coasts belonging to each Power respectively, according to the principles of international law, can now scarcely admit of any other construction than that Denmark and Sweden equally possess the usual and ordinary rights of the *jus littoris*.

CHAPTER VI.—NARROW SEAS, AS DISTINGUISHED FROM THE OCEAN.

CLXXX. Claims have been preferred by different nations to the exclusive dominion over *the seas surrounding their country*: if not to every part of such seas, to an extent far beyond the limits assigned in the foregoing paragraphs.

This kind of claim is distinguished from the claim of jurisdiction over the *ocean* by being confined to what are called *the narrow or adjacent seas*, they not being (it is contended), like the ocean, the great highway of the nation. It is further distinguished from the case of the *Straits* which has just been discussed, by the fact of the claimants not possessing the opposite shore.

CLXXXI. This claim is rested upon immemorial usage, upon national records, upon concessions of other States, upon the language of treaties. Considering the nature of the claim, and of the subject over which it is to be exercised, it cannot be built securely upon a less foundation than the express provisions of positive treaty, and can be valid only against those nations who have signed such treaty. "There may, by legal possibility" (as Lord Stowell says),² "exist a peculiar property excluding the universal or common use"; but the strongest presumption of law is adverse to any such pretension. The

¹ See *Ann. Reg.* for 1855, p. 291. *Hortale's Treaties*, x, pp. 736, 742, 743. *Dana's Wheaton*, p. 185, n. 112. *Lawrence's Wheaton*, p. 333, n. 110.

² *The Twee Gebroeders*, 3 C. Rob., Adm. Rep. 339. Günther, *Das Britanische Meer*, vol. II, s. 20, p. 39.

Portuguese affected at one time to prevent any foreign vessel from navigating the African seas near the Bissagos Islands: and it is known that Great Britain once laid claim to exclusive right of property and jurisdiction, not merely over the British Channel extending from the island of *Ouessant* to the *Pas de Calais*, but over the four seas which surround her coasts.¹ Nor was this only while the Duchy of Normandy was held with the British dominions; or even while Calais, or the *Pas de Calais*, belonging to Great Britain, a circumstance of considerable weight with respect to their claim. Albericus Gentilis, in one of his *Advocationes Hispanicæ*,² published in 1613, supports these pretensions. Queen Elizabeth seized upon some Hanseatic vessels lying at anchor off Lisbon for having passed through the sea north of Scotland without her permission.

CLXXXII. In support of this doctrine, Selden³ wrote his celebrated *Mare Clausum*, in which he sought to establish two propositions: (1) That the sea might be property; (2) That the *seas* which washed the shores of Great Britain and Ireland were subject to her sovereignty even as far as the northern pole.

The opinions of jurists, as well as the practice of nations, have decided, that this work did not refute the contrary propositions laid down by Grotius in his *Mare Liberum*, to which it purported to be an answer. Selden dedicated his work to Charles I; and so fully did that monarch imbibe its principles, that in 1619 he instructed Carleton, the British ambassador, to complain to the States General of the Dutch Provinces of the audacity of Grotius in publishing his *Mare Liberum*, and to demand that he should be punished. Not less agreeable was this doctrine to Cromwell and the Republican Parliament. They made war upon the Dutch to compel them to acknowledge the British empire over these seas.⁴

CLXXXIII. The rights occasionally claimed by Great Britain in these seas were chiefly those of exclusive fishing, and of exacting the homage of salute from all common vessels. But it is very remarkable that Sir Leoline Jenkins, who was in fact the expounder of all international law to the Government of Charles II and James II, appears never to have insisted upon these extravagant demands, but to have confined the rights of his country within the just and moderate limits which have been already stated.

CLXXXIV. It is true that the Dutch appear to have occasionally admitted the exclusive right of fishery, by making payment and taking out licences to fish—payment and licences which were afterwards suspended by treaties between England and the Burgundian

¹ Wheaton's *Hist.*, part 1, s. 18, p. 152, etc., contains a clear and valuable account.

² Lib. 1, cap. viii.

³ John Selden *Mare Clausum, sive de Dominio Maris*, lib. ii.

⁴ Comte de Garden, *Traité de Diplom.*, vol. 1, p. 402.

princes. It is true that, by the fourth article of the Treaty of Westminster, concluded in 1674, the Dutch conceded the homage of the flag in the amplest manner to the English. "It was carried" (says Sir W. Temple, the negotiator of the treaty) "to all the height his Majesty could wish; and thereby a claim of the crown, the acknowledgement of its dominion in the Narrow Seas, allowed by treaty from the most powerful of our neighbors at sea, which had never yet been yielded to by the weakest of them that I remember in the whole course of our pretense; and had served hitherto but for an occasion of quarrel, whenever we or they had a mind to it, upon either reasons or conjectures."¹

CLXXXV. Upon this concession, so humiliating to the countrymen of Ruyter and Van Tromp, so little to be expected by those who in 1667 had demolished Shierness and set fire to Chatham, Bynkershoek² ingeniously remarks: "Usu scilicet maris et *fructu* contenti Ordines, aliorum ambitioni, sibi non damnosae, haud difficulter cedunt." And in his treatise *De Dominio Maris*, published in 1702, and before the work from which the extract just cited is taken, he observes, on this article of the treaty:

Sed quod ita accipiendum est, ut omnes pactiones, quas, ut bello abstinenceatur, paciscimur, nempe Anglis id competere, quia in id convenit, per se enim nihil in eo mari habent, praecipuum. Porro ut ita hoc accepi velim ut ne credamus Belgas eo ipso Anglis concessisse illius maris dominium, nam aliud est se subditum profiteri, aliud majestatem alicujus populi *comiter* conservare (ut haec explicat *Proculus* in Dig. xlix, t. 15, 7, *de Captiv. et Postlim.*); fit hoc, ut intelligamus alterum populum superiorem esse, non ut intelligamus, alterum non esse liberum."³

CLXXXVI. France, however, as Mr. Wheaton observes, never formerly acknowledged the British pretension. Louis XV published an ordinance on April 15, 1689, not only forbidding his naval officers from saluting the vessels of other princes bearing a flag of equal rank, but, on the contrary, enjoining them to require the salute from foreign vessels in such a case, and to compel them by force, in whatever seas and on whatever coasts they might be found. This ordinance was plainly levelled at England. Accordingly, in the manifesto published by William III on May 27, 1689, he alleged this insult to the British flag as one of the motives for declaring war against France.⁴

¹ *Traotatus Pacis inter Carolum II Regem Magnae Britanniae et Ordines Generales foederati Belgii*, 1674, art. 4. Bynkershoek, *Quaest. J. P.*, l. ii, c. xxi. Temple, *Memoirs*, ii, p. 250. Hume, vol. vi, c. lli. Wheaton, *Hist.*, pp. 155-8.

² *Quaest. J. P.*, lib. i, cap. xxi.

³ *De Dominio Maris*, cap. v.

⁴ Vallin, *Commentaire sur l'Ordonnance de la Marine*, liv. v. tit. 1, p. 689. Wheaton, *History*, p. 155-8.

CLXXXVII. In another part of his very able treatise, Bynkershoek clearly and irrefragably lays down the principles of law applicable to the occupation of the sea :

Totum, qua patet, mare non minus jure naturali cedebat occupanti, quam terra quaevis, aut terrae mare proximum. Sed difficilior occupatio, difficillima possessio; utraque tamen necessaria ad asserendum dominium, jure videlicet gentium, ad quod ea disputatio unice exigenda est. Nam ex iis, quae cap. 1 enarravimus, certum est consequi, dominium maris prima ab origine non fuisse quaesitum nisi occupatione, hoc est, navigatione eo animo instituta, ut qui libera per vacuum ponit vestigia princeps, ejus, quod navigat, maris esse velit dominus; certum est et porro consequi, non aliter id dominium retinere, quam possessione perpetua, hoc est, navigatione, quae perpetuo exercetur ad custodiam maris, si exterum est, habendam: ea namque remissa, remittitur dominium, et redit mare in causam pristinam, atque ita rursus occupanti primum cedit.”¹

CLXXXVIII. Thus the opinion of Sir Leoline Jenkins and Bynkershoek are in harmony upon this question; and in spite of the proclamation of William III it does not appear that Great Britain has ever again insisted upon any other limits to her or to other nations.

This right, however, was alluded to by Lord Stowell in his judgment in the *Maria*,² a Swedish vessel sailing under convoy of an armed ship condemned for resisting the belligerents' visitation and search: “It might likewise” (he observes) “be improper for me to pass entirely without notice, as another preliminary observation (though without meaning to lay any particular stress upon it), that the transaction in question took place in the *British Channel* close upon the *British coast*, a station over which the Crown of England has, from pretty remote antiquity, always asserted something of that special jurisdiction which the sovereigns of other countries have claimed and exercised over certain parts of the seas adjoining to their coasts.”

CHAPTER VII.—NARROW SEAS—STRAITS.

CLXXXIX. With respect to Straits (*détroits de mer*, *Meerenge*, *freta*), where there is, as Grotius says in the passage already cited, *supra et infra fretum*, both the shores of which belong to one nation, these may be subject to the proprietary rights of that nation. Or if the shores belong to several nations, then, according to Pufendorf,³ the dominion is distributed amongst them upon the same principle as it would be among the several proprietors of the banks of a river:

¹ Bynkershoek, *De Dominio Maris*, cap. iii, pp. 365–6.

² 1 C. Rob., *Adm. Rep.*, p. 352.

³ Lib. iv, c. v. s. 7. Pufendorf, *De Jure Nat. et Gent.*, l. iv, c. v, s. 8.

“eorum imperia, pro latitudine terrarum, ad medium usque ejusdem pertinere intelligentur.”

The exclusive right of the British Crown to the Bristol Channel, to the channel between Ireland and Great Britain (*Mare Hibernicum, Canal de Saint-George*), and to the channel between Scotland and Ireland, is uncontested. Pretty much in the same category were the three straits, forming the entrance to the Baltic, the Great and the Little Belt and the Sound, so long as the two shores belonged to the Crown of Denmark;¹ the straits of Messina (*il Faro di Messina, fretum Siculum*), once belonging to the Kingdom of the Two Sicilies; the straits leading to the Black Sea, the Dardanelles and Hellespont; the Thracian Bosphorus, belonging to the Turkish Empire.² To narrow seas which flow between separate portions of the same kingdom, like the Danish and Turkish straits, or to other seas common to all nations, like the straits of Messina, and perhaps the St. George's Channel, the doctrine of *innocent use* is, according to Vattel, strictly applicable.³ How far this doctrine is sound to the extent to which it is carried by this jurist has been already considered in the matter of *Rivers*.

In 1602 Queen Elizabeth sent a special embassy to Denmark, having for its object the general adjustment of the relations between the two countries.

In the instructions given to the ambassadors, the principles of International Law, with respect to the subjects treated of in this chapter, are laid down with the perspicuity and precision which might be expected from the learning and ability, both of the monarch and her counsellors:

And you shall further declare that the Lawe of Nations alloweth of fishing in the sea everywhere; as also of using ports and coasts of princes in amitie for traffique and avoidinge danger of tempests; so that if our men be barred thereof, it should be by some contract. We acknowledge none of that nature; but rather, of conformity with the Lawe of Nations in these respects, as declaring the same for the removing of all clayme and doubt; so that it is manifest, by denying of this Fishing, and much more, for spoyling our subjects for this respect, we have been injured against the Lawe of Nations, expresslie declared by contract, as in the aforesaid Treaties, and *the King's* own letters of '85.

And for the asking of licence, if our predecessors yelded thereunto, it was more than by Lawe of Nations was due;—yelded, perhaps, upon some special consideration, yet, growing out of use, it remained due by the Lawe of Nations, what was

¹ Schlegel, *Staatsrecht Dänemarks*, p. 359. See *supra*, § clxxix.

² Martens, l. II, c. 1, s. 41, *Des mers adjacentes*. Grotius, l. II, c. III, s. 13, 2. Wheaton, *Hist.*, pp. 577, 583, 585, 587.

³ Vattel, *Des détroits en particulier*, l. 1, c. xxiii, s. 293.

otherwise due before all contract; wherefore, by omitting licence, it cannot be concluded, in any case, that the right of Fishing, due by the Lawe of Nations, faileth; but rather, that the omitting to require Licence might be contrarie to the contract, yf any such had been in force.

Sometime, in speech, *Denmark* claymeth propertie in that Sea, as lying between *Norway* and *Island*,—both sides in the dominions of oure loving brother *the king*; supposing thereby that for the propertie of a whole sea, it is sufficient to have the banks on both sides, as in rivers. Whereunto you may answere, that though property of sea, in some small distance from the coast, maie yeild some oversight and jurisdiction, yet use not princes to forbid passage or fishing, as is well seen in our Seas of England, and Ireland, and in the Adriaticke Sea of the *Venetians*, where we in ours, and they in theirs, have propertie of command; and yet neither we in ours, nor they in theirs, offer to forbid fishing, much lesse passage to ships of merchandize; the which, by Lawe of Nations, cannot be forbidden ordinarilie; neither is it to be allowed that propertie of sea in whatsoever distance is consequent to the banks, as it hapneth in small rivers. For then, by like reason, the half of every sea should be appropriated to the next bank, as it hapneth in small rivers, where the banks are proper to divers men; whereby it would follow that noe sea were common, the banks on every side being in the propertie of one or other; wherfore there remaineth no colour that *Denmarke* may claim any propertie in those seas, to forbid passage or fishing therein.

You may therefore declare, that we cannot, with our dignitie, yeld that our subjects be absolutelie forbidden those seas, ports, or coasts, for the use of fishing negotiations and safetie; neither did we ever yeld anie such right to *Spaine* and *Portugall*, for the *Indian* Seas or Havens; yet, yf our good brother *the king*, upon speciall reason, maie desire that we yeld to some renuinge of licence, or that some speciall place, upon some speciall occasion, be reserved to his particular use, in your discretion, for amitie sake, you may yeld thereunto; but then to define the manner of seking licence, in such sort as it be not prejudiciall to our subjects, nor to the effect of some sufficient fishing, and to be rather caried in the subject's name, than in ours, or the king's.¹

CXC. The alliances contracted between the United Provinces of the Netherlands with the city of Lübeck in 1613, with Sweden in 1614 and 1640, and with the Hanseatic towns in 1615 and 1616, were all directed against the extraordinary pretensions of the Danish Crown.

But in more modern times these pretensions, though extravagant enough, have been limited to the right of excluding foreigners, not only from all commerce with Iceland and the Danish portion of Greenland, but from fishing within 15 miles of the coast of Iceland.

¹ Rymer, *Foed.*, vol. xvi, pp. 433-4.

The first ordinance of the kind was put forth by Denmark on April 16, 1636, and pointed at Great Britain; in 1682, it was renewed and confirmed; again on May 30, 1691; again on May 3, 1723; and again on April 1, 1776.

With respect to Greenland, the first prohibition to fish appears to have been issued on February 16, 1691. This was pointed against the Hanseatic towns. By a Treaty concluded on August 16, 1692, the city of Hamburg obtained the right of navigation and fishing in Davis's Straits.

By Royal Edicts in 1751, in 1758, and in 1776, the commerce of *unprivileged* foreigners with Greenland was strictly forbidden.

CXCI. In these prohibitions there was no violation of the strict law, however they might offend the usual comity of nations. But the validity of the prohibition to fish within 15 German miles of the shore of Greenland and Iceland was strictly denied by England and Holland, who adhered to the usual limit of cannon-shot from the shore.

CXCII. In the year 1740, a Danish man-of-war seized upon several Dutch vessels, alleged to be found navigating and fishing within the forbidden limits. They were taken to Copenhagen, tried and condemned in the Court of Admiralty of that capital. This act led to a vehement remonstrance on the part of the Dutch.¹

The States General, in a Resolution of April 17, 1741, laid down three distinct propositions, of which the substance was—

1. That the sea was free; and that it was competent to everyone to fish in it in a proper manner, "*pourvu qu'il ne fasse pas d'une manière indue*," which they maintained could not be predicated of fishing within four German miles of the coast, inasmuch as Denmark might make such a *Municipal* prohibition binding on her own subjects, but could not convert it into an *International* obligation.

2. That this right was fortified, in the case of Holland, by several treaties with Denmark.

3. That they were in possession, and had long been so, of the right in question.

The Danish Government denied all these positions with reference to the particular sea.

1. "Les rois de Danemark," they said. "Norvège, etc., ont joui depuis un temps immémorial des pleins effets d'une juste possession dans la mer du Nord."² That, possessing this "*domination juste et immémoriale*," they were, on the authority of Grotius, entitled to the exclusive fishery.³

2. They went at length into the alleged treaties, and drew from them a contrary inference.

¹ Martens, *Causes célèbres*, vol. 1, p. 359.

² *Ibid.*, vol. 1, p. 392.

³ *Ibid.*, vol. 1, pp. 393-4.

3. They denied the possession of the right by the Dutch, alleging that clandestine acts, punished as soon as discovered, could not be construed as possession, and that none others could be shown.

The dispute came to no legal termination. The crews of the seized ships were given up, but neither the ships nor their cargoes. In 1748 the Dutch sent ships of war to protect their merchantmen. Denmark threatened to make war, but did not.

CXCIII. In 1776 the strict provisions of the Danish Government for prohibiting all foreign nations from carrying on any commerce with Greenland gave rise to disputes between Denmark and Great Britain, and between Denmark and Holland, with respect to the seizure of an English brigantine and two Dutch vessels for alleged violation of these provisions, and their condemnation in the Danish Court of Admiralty. In both cases the vessels were, at the application of their respective Governments, restored; but all claims for compensation by way of damage were steadily refused, as it was said that the vessels had been legally condemned by a proper tribunal.¹ The Dutch on this occasion protested against the Danish pretensions with respect to Davis Straits and the Greenland fisheries.²

CXCIV. Great Britain has never been remiss in maintaining the rights of her fisheries. The Newfoundland fisheries were the subject of careful provisions in the Treaties of Utrecht and Paris, 1763,³ and were in 1818 regulated by a Convention between Great Britain and the United States of North America.⁴

CXCV. The language of the Article of the Convention was that—

Whereas differences have arisen respecting the liberty claimed by the United States, for the inhabitants thereof to take, dry, and cure fish on certain coasts, bays, harbours, and creeks of his Britannic Majesty's dominions in America, it is agreed between the high contracting parties, that the inhabitants of the said United States shall have for ever, in common with the subjects of his Britannic Majesty, the liberty to take fish of every kind on that part of the southern coast of Newfoundland which extends from Cape Ray to the Ramean Islands, on the western and northern coasts of the said Newfoundland, from the said Cape Ray to the Quirpon Islands, on the shores of the Magdalen Islands, and also on the coasts, bays, harbours, and creeks, from Mount Joly, on the

¹ Extract from letter of Danish Government to the British Minister at Copenhagen. Martens, *Causes célèbres*, vol. II, pp. 131–2.

² Extract from the letter of the Dutch Minister at Copenhagen to Danish Government. *Ibid.*, pp. 139–40. See, too, disputes between England, Denmark, and Holland, 1776; as to the Iceland fisheries, 1790, between Denmark and Holland, *ibid.*, vol. I; as to Finland, Heffter, 140, n. 3; Ortolan, *Dipl. de la Mer*, vol. I, 176; as to the Zuyder Zee, *The Twee Gebroeders*, 3 C. Rob., *Adm. Rept.*, p. 339.

³ Koch, *Hist. des Tr.*, I, 209, 362. Art. 13 of the Treaty of Utrecht. Art. 5 of the Treaty of Paris.

⁴ The line of demarcation between the rights of fishing of English and French subjects in the British Channel was elaborately defined by the Treaty of August 2, 1839. De Martens and de Cussy, vol. IV, 601, vol. III, 891.

southern coast of the Labrador, to and through the Straits of Belle Isle, and thence northwardly indefinitely along the coast, without prejudice, however, to any of the exclusive rights of the Hudson's Bay Company; and that the American fishermen shall also have liberty for ever to dry and cure fish in any of the unsettled bays, harbours, and creeks of the southern part of the coast of Newfoundland, here above described, and off the coast of Labrador; but so soon as the same, or any portion thereof, shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such portion so settled, without previous agreement for such purpose with the inhabitants, proprietors, or possessors of the ground.

And the United States hereby renounce forever any liberty heretofore enjoyed or claimed by the inhabitants thereof to take, dry, or cure fish on or within three marine miles of any of the coasts, bays, creeks, or harbours of his Britannic Majesty's dominions in America not included within the above-mentioned limits. Provided, however, that the American fishermen shall be admitted to enter such bays or harbours for the purpose of shelter and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever. But they shall be under such restrictions as may be necessary to prevent their taking, drying, or curing fish therein, or in any other manner whatever abusing the privileges hereby reserved them.¹

CXCVI. It appears that these provisions had not been strictly observed by the subjects of the United States, and that in 1849 complaints were made by the Legislature of Nova Scotia to the British Crown, who took the opinion of the Law officers as to the true construction of the Article. This opinion was, that—

By the terms of the convention, American citizens were excluded from any right of fishing within three miles from the coast of British America, and that the prescribed distance of three miles is to be measured from the headlands, or extreme points of land, next the sea or the coast, or of the entrance of bays or indents of the coast, and that consequently no right exists on the part of American citizens to enter the bays of Nova Scotia, there to take fish, although the fishing, being within the bay, may be at a greater distance than three miles from the shore of the bay, as we are of opinion that the term "headland"² is used in the Treaty to express the part of the land we have before mentioned, including the interior of the bays and the indents of the coasts.³

The neglect of these provisions by the subjects of the United States still continued, and in 1852 British men-of-war were sent to protect the fisheries and seize the boats which violated the Treaty.

¹ *Annual Reg.*, vol. xciv (1852), pp. 295-6.

² The term "*headland*," however, does not occur in the Treaty. The Law officers probably gave their opinion on a statement of the Colonists in which the word did occur. My attention was drawn to this strange fact by Mr. Addison Thomas in 1854, after the publication of the first edition of this work.

³ *Annual Reg.*, vol. xciv (1852), pp. 296-7. See, too, President Fillmore's Annual Message, 299.

This act of the British Government created a great excitement in the United States, though it does not appear that the legality of the construction of the Article was impugned; but Mr. Webster insisted on the inconvenience to the subjects of the United States, and on the want of *comity* shown in its sudden enforcement after many years.¹ of an opposite practice.² A temporary adjustment was effected by a Treaty of June 5, 1854—the Reciprocity Treaty already mentioned. It gave to citizens of the United States, in addition to their rights under the Treaty of 1818, the right to take fish, except shellfish, “on the sea coasts and shores, and in the bays, harbours, and creeks of Canada, New Brunswick, Nova Scotia, and Prince Edward’s Island, and of the several islands thereunto adjacent, without being restricted to any distance from the shore,” with permission to land for the purpose of drying nets and curing fish. Corresponding rights were given to British subjects to take sea fish and to land and dry nets on the coast of the United States north of latitude 36° N. The Treaty did not embrace the salmon and shad fisheries, or the fisheries at the mouths of rivers. But we have already observed that the United States, using the power given them by the Treaty, put an end to it in 1865.³

One of the provisions of the Treaty of Washington of May 1871 established a tribunal of Arbitrators to award upon the claim of Canada to compensation in respect to her fisheries from the United States.⁴ The Halifax Fishery Commissioners awarded to Canada as a compensation five and a half millions of dollars. The American Commissioner, however, dissented from the award, and his dissent was the more important, because there was no special provision, as there was with regard to the Geneva arbitration, that the award of the majority should suffice. It was at one time uncertain what the United States would do in consequence of this omission; but in 1878 Congress passed a law providing for the payment of the indemnity.

CHAPTER VIII.—PORTIONS OF THE SEA.

CXCVII. Though the open sea be thus incapable of being subject to the rights of property, or jurisdiction, yet reason, practice, and authority have firmly settled that a different rule is applicable to *certain portions* of the sea.⁵

¹ Twenty-five, it is said by President Fillmore.

² *Annual Reg.* for 1852, vol. xciv, pp. 295–300.

³ See Dana’s *Wheaton*, n. 110, p. 206; Lawrence’s *Wheaton*. The *Revue des Deux Mondes*, vol. xvi, November, 1874, contains an able article on *Les Pêcheries de Terre Neuve et les Traités*.

⁴ See *Papers relating to the Treaty of Washington*, published by the American Government. Washington, 1872. 5 vols.

⁵ Günther, vol. ii, s. xxviii, p. 48: “Elgenthum und Herrschaft des Meeres an den Küsten.”

Heffter, bk. 1, s. lxxvi, p. 141: “Schutzrechte über die Küstengewässer.”

Ortolan, *Dipl. de la Mer*, vol. i, l. ii, c. viii: “Mer territoriale.”

Kent, *Commentaries*, vol. i, s. xxvi, p. 25.

CXCVIII. And first with respect to that portion of the sea which washes the coast of an independent State. Various claims have been made, and various opinions pronounced, at different epochs of history, as to the extent to which territorial property and jurisdiction may be extended. But the rule of law may be now considered as fairly established—namely, that this absolute property and jurisdiction does not extend, unless by the specific provisions of a Treaty¹ or an unquestioned usage, beyond a marine league (being 3 miles), or the distance of a cannon-shot, from the shore at low tide: “quousque e terra imperari potest”—“quousque tormenta exploduntur”—“terrae dominium finitur ubi finitur armorum vis”—is the language of Bynkershoek.² “In the sea out of the reach of cannon-shot” (says Lord Stowell), “universal use is presumed.” This is the limit fixed to absolute property and jurisdiction; but the rights of independence³ and self-preservation in times of peace have been judicially considered to justify a nation in preventing her revenue laws from being evaded by foreigners beyond this exact limit; and both Great Britain and the United States of North America have provided by their municipal law against frauds being practiced on their revenues, by prohibiting foreign goods to be transhipped within the distance of 4 leagues of the coast, and have exercised a jurisdiction for this purpose in time of peace. These were called the *Hovering Acts*.⁴

Nevertheless, it can not be maintained as a sound proposition of International Law that a seizure for purposes of enforcing municipal law can be lawfully made beyond the limits of the territorial waters, though in these *hovering* cases judgments have been given in favour of seizures made within a limit fixed by municipal law, but exceeding that which has been agreed upon by International Law. Such a judgment, however, could not have been sustained if the Foreign State whose subject's property had been seized had thought proper to interfere. Unless, indeed, perhaps, in a particular case, where a State had put in force, or at least enacted, a municipal law of its own, like that of the Foreign State under which its subject's property

¹ Vallin, *Ordonnance de la Marine*, l. v, tit. 1, p. 687, “De la Liberté de la Pêche,” contains a full dissertation on this subject. Klüber, s. 130, n. a.

² *Quæstiones Juris Publici*, cap. viii.

³ *The Louis*, 2 Dodson, *Adm. Rep.*, p. 245.

The Twee Gebroeders, 3 C. Rob., *Adm. Rep.*, p. 339.

Jacobsen, *Seerecht*, pp. 586–590.

United States and Morocco (1787), Art. 10.—De Martens and de Cussy, *Rec. de Traités*, etc., vol. i, p. 380.

France and Russia, Art. 27, *ibid.*, p. 395. (This treaty was only entered into for 12 years.)

The United States of America and Great Britain, Art. 25—*Ibid.*, vol. ii, p. 92.

⁴ *Church v. Hubbards*, 2 Cranch, *Reports*, p. 187.—*The Louis*, 2 Dodson, *Adm. Rep.*, 245–6. This case will not be found on examination to support the lawfulness of a seizure beyond the marine league, though often cited for this purpose.—Walte, *American State Papers*, 1–75.

had been seized. It is at least quite intelligible why such a State would not interfere on behalf of its subject. My observation does not deny to the neutral, in time of war, the right to complain of and possibly to prevent the *hovering* of belligerent ships so near her coasts and ports as manifestly to menace and alarm vessels homeward or outward bound. This is a question which will receive further consideration when the relations of States in time of war come under discussion. The limit of territorial waters has been fixed at a marine league, because that was supposed to be the utmost distance to which a cannon-shot from the shore could reach. The great improvements recently effected in artillery seem to make it desirable that this distance should be increased, but it must be so by the general consent of nations, or by specific treaty with particular States.¹

CXCVIII A. In the year 1860 an English ship ran down a foreign ship within 3 miles of the English coast; the owners of the foreign ship brought a suit, and obtained judgment against the English vessel, the owners of which then filed their bill to obtain the benefit of the limitation of liability prescribed by the Merchant Shipping Act, 1854. It was decided by Vice-Chancellor Page Wood, after a very able and learned argument, that these provisions applied.²

CXCVIII B. In the recent case (1876 A. D.) of *Regina v. Keyn*,³ the prisoner was a foreigner in command of a foreign ship on a voyage from one foreign port to another. Whilst passing within 3 miles of the English coast his ship ran into a British ship and sank her. A passenger on board the British ship was drowned, and the prisoner, having been indicted at the Central Criminal Court, was found guilty of manslaughter. The question whether that court had jurisdiction was reserved for the Court for Crown Cases Reserved. After the case had been twice argued, it was holden by a majority of one,⁴ that the Central Criminal Court had no jurisdiction to try the prisoner for the offense charged. The whole of the majority rested their decision on the ground that prior to 28 Hen. VIII, c. 15, the Admiral had no jurisdiction to try offenses by foreigners on board foreign ships, whether within or without the limit of 3 miles from the English coast; that that statute and the subsequent ones

¹ *Hudson v. Guestier*, 4 Cranch, 293, and 6 Cranch, 281. Not easily reconcilable with *Rose v. Hilmely*, 4 Cranch, 241. Dana, Wheaton, p. 180, n. 108.

² *The General Iron Screw Collier Co. v. Schurmans*, 1 Johnson and Hemming, Rep., p. 180. These sections have been superseded by other provisions in the Merchant Shipping Act Amendment Act, 1862.

³ *Law Reports*, 2 Ex. Div., p. 63.

⁴ The majority consisted of Cockburn, C. J., Kelly, C. B., Bramwell, J. A., Lush and Field, J. J., Sir R. Phillimore and Pollock, B.; the dissentients were Lord Coleridge, C. J., Brett and Amphlett, J. J. A., Grove, Denman, and Lindley, J. J. Archibald, J., agreed with the majority but died before the judgment was delivered.

See, for a comment upon this judgment, p. 21 of the Argument of Mr. R. H. Dana on behalf of the United States before the Halifax Fishery Commissioners. In this argument the reasoning of the majority is approved and adopted.

only transferred to the common-law courts and the Central Criminal Court the jurisdiction formerly possessed by the Admiral; and that, therefore, in the absence of statutory enactment, the Central Criminal Court had no power to try such an offense.

Sir F. Kelly and the author of these Commentaries relied also on the ground that, by the principles of International Law, the power of a nation over the sea within 3 miles of its coasts is only for certain limited purposes; and that Parliament could not consistently with those principles apply English criminal law within those limits.

The writer of these pages summed up in his judgment the conclusions which appeared to him to result from the various authorities referred to, as follows.¹

The consensus of civilized independent States has recognized a maritime extension of frontier to the distance of 3 miles from low-water mark, because such a frontier or belt of water is necessary for the defense and security of the adjacent State.

It is for the attainment of these particular objects that a *dominium* has been granted over this portion of the high seas.

This proposition is materially different from the proposition contended for, namely, that it is competent to a State to exercise within these waters the same rights of jurisdiction and property which appertain to it in respect to its lands and its ports. There is one obvious test by which the two sovereignties may be distinguished.

According to modern International Law, it is certainly a right incident to each State to refuse a passage to foreigners over its territory by land, whether in time of peace or war. But it does not appear to have the same right with respect to preventing the passage of foreign ships over this portion of the high seas.

In the former case there is no *jus transitus*; in the latter case there is.

The reason of the thing, that is, the defense and security of the State, does not require or warrant the exclusion of peaceable foreign vessels from passing over these waters, and the custom and usage of nations have not sanctioned it.

Consequences fraught with mischief and injustice might flow from the opposite doctrine, which would render applicable to a foreign vessel while *in itinere* from one port to another, passing over these waters, all the criminal law of the adjacent territory. No single instance has been brought to our notice of the practical exercise by any nation of this jurisdiction.

The authorities cited in order to show that a foreign vessel is subject to the laws of the foreign port which she enters appear to me inapplicable to the present case.

A foreign merchant vessel going into the port of a foreign State subjects herself to the ordinary law of the place during

¹ *Law Reports*, 2 *Ex. Div.*, p. 81.

the period of her commorancy there; she is as much a *subditus temporaneus* as the individual who visits the interior of the country for the purposes of pleasure or business.

It may be that the foreign State, influenced by considerations of public policy or by treaty obligations, chooses to forego the exercise of her law over the foreign vessel and crew, or exercises it only when they disturb the peace and good order of the port. This is the course which France has usually pursued; an illustration of it is furnished by the case cited from Dalloz (*Juris. Gén.* 1859, "Cour de Cassation," pp. 88, 89), the result of which is correctly stated in the marginal note:

"Les bâtimens de commerce étrangers, stationnant dans un port français, sont soumis à la juridiction territoriale pour ce qui concerne les délits entre étrangers et notamment entre gens de l'équipage, dont la répression n'intéresse pas exclusivement la discipline et l'administration intérieure du bord.— (*C. Nap.* 3; *Av. Cons. d'Et.* 20, Nov., 1806.)

"Il en est ainsi, surtout, lorsque ces délits sont de nature à compromettre la tranquillité du port, ou lorsque l'intervention de l'autorité locale a été réclamée."

I can not entertain any doubt that in this country a foreign sailor, complaining of the ill-treatment of his master on board a foreign ship in an English port, would be entitled to the protection of an English court of justice.

If, indeed, as has been contended, there be no difference between the jurisdiction by the adjacent State over vessels in ports and over passing and commorant vessels, then the whole criminal law of England was applicable to the crew and those on board the German vessel, so long as she was within a marine league of the English shore.

The consequences of such a position of law appear to me, especially in the absence of any precedent, sufficient to render it untenable.

CXCVIII *c.* In consequence of the decision in this case an Act was passed in the session of 1878¹ which, after a preamble reciting that "the rightful jurisdiction of her Majesty, her heirs and successors extends and has always extended over the open seas adjacent to the coasts of the United Kingdom, and of all other parts of her Majesty's dominions to such a distance as is necessary for the defense and security of such dominions," and that "it is expedient that all offenses committed in the open sea within a certain distance of the coasts of the United Kingdom and of all other parts of her Majesty's dominions, by whomsoever committed, should be dealt with according to law," proceeds to enact as follows:

1. This Act may be cited as the Territorial Waters Jurisdiction Act, 1878.

2. An offense committed by a person, whether he is or is not a subject of her Majesty, on the open sea within the territorial

¹ 41 and 42 Vict., c. 73.

waters of her Majesty's dominions, is an offense within the jurisdiction of the Admiral, although it may have been committed on board or by means of a foreign ship, and the person who committed such offense may be arrested, tried, and punished accordingly.

3. Proceedings for the trial and punishment of a person who is not a subject of her Majesty, and who is charged with any such offense as is declared by this Act to be within the jurisdiction of the Admiral, shall not be instituted in any court of the United Kingdom, except with the consent of one of her Majesty's Principal Secretaries of State, and on his certificate that the institution of such proceedings is in his opinion expedient, and shall not be instituted in any of the dominions of her Majesty out of the United Kingdom, except with the leave of the governor of the part of the dominions in which such proceedings are proposed to be instituted, and on his certificate that it is expedient that such proceedings should be instituted.

4. On the trial of any person who is not a subject of her Majesty for an offense declared by this Act to be within the jurisdiction of the Admiral, it shall not be necessary to aver in any indictment or information on such trial that such consent or certificate of the Secretary of State or Governor as is required by this Act has been given, and the fact of the same having been given shall be presumed, unless disputed by the defendant at the trial; and the production of a document purporting to be signed by one of her Majesty's Principal Secretaries of State as respects the United Kingdom, and by the Governor as respects any other part of her Majesty's dominions, and containing such consent and certificate, shall be sufficient evidence for all the purposes of this Act of the consent and certificate required by this Act.

Proceedings before a justice of the peace or other magistrate previous to the committal of an offender for trial or to the determination of the justice or magistrate that the offender is to be put upon his trial shall not be deemed proceedings for the trial of the offense committed by such offender for the purposes of the said consent and certificate under this Act.

5. Nothing in this Act contained shall be construed to be in derogation of any rightful jurisdiction of her Majesty, her heirs or successors, under the law of nations, or to affect or prejudice any jurisdiction conferred by Act of Parliament or now by law existing in relation to foreign ships or in relation to persons on board such ships.

6. This Act shall not prejudice or affect the trial in manner heretofore in use of any act of piracy as defined by the law of nations, or affect or prejudice any law relating thereto; and where any act of piracy as defined by the law of nations is also any such offense as is declared by this Act to be within the jurisdiction of the Admiral, such offense may be tried in pursuance of this Act, or in pursuance of any other Act of Parliament, law, or custom relating thereto.

In this Act, unless there is something inconsistent in the context, the following expressions shall respectively have the meanings herein-after assigned to them; that is to say—

“The jurisdiction of the Admiral,” as used in this Act, includes the jurisdiction of the Admiralty of England and Ireland, or either of such jurisdictions as used in any Act of Parliament; and for the purpose of arresting any person charged with an offense declared by this Act to be within the jurisdiction of the Admiral, the territorial waters adjacent to the United Kingdom, or any other part of her Majesty’s dominions, shall be deemed to be within the jurisdiction of any judge, magistrate, or officer having power within such United Kingdom, or other part of her Majesty’s dominions, to issue warrants for arresting or to arrest persons charged with offenses committed within the jurisdiction of such judge, magistrate, or officer.

“United Kingdom” includes the Isle of Man, the Channel Islands, and other adjacent islands.

“The territorial waters of her Majesty’s dominions,” in reference to the sea, means such part of the sea adjacent to the coast of the United Kingdom, or the coast of some other part of her Majesty’s dominions, as is deemed by international law to be within the territorial sovereignty of her Majesty; and for the purpose of any offence declared by this Act to be within the jurisdiction of the Admiral, any part of the open sea within one marine league of the coast measured from low-water mark shall be deemed to be open sea within the territorial waters of her Majesty’s dominions.

“Governor,” as respects India, means the Governor-General or the Governor of any Presidency; and where a British possession consists of several constituent colonies, means the Governor-General of the whole possession or the Governor of any of the constituent colonies; and as respects any other British possession, means the officer for the time being administering the government of such possession; also any person acting for or in the capacity of Governor shall be included under the term “Governor.”

“Offence,” as used in this Act means an act, neglect, or default of such a description as would, if committed within the body of a county in England, be punishable on indictment according to the law of England for the time being in force.

“Ship” includes every description of ship, boat, or other floating craft. “Foreign ship” means any ship which is not a British ship.

It is hardly necessary to state that this Statute does not affect the general International Law on the subject.

CXCIX. The rule of the marine league being the boundary of the territorial jurisdiction is liable to be affected by Treaty. The Emperor of China has conceded jurisdiction to the Crown of England over British subjects in China; and the Crown, by an Order in Council assented to by the Chinese Government, has jurisdiction over British subjects “being within the dominions of the Emperor

of China, or being within any ship or vessel at a distance of not more than *one hundred* miles from the coast of China.”¹

CC. Besides the rights of property and jurisdiction within the limit of cannon-shot from the shore, there are certain portions of the sea which, though they exceed this verge, may, under special circumstances, be prescribed for. Maritime territorial rights extend, as a general rule, over arms of the sea, bays, gulfs, estuaries which are enclosed, but not entirely surrounded by lands belonging to one and the same State. With respect to bays and gulfs so inclosed, there seems to be no reason or authority for a limitation suggested by Martens,² “surtout en tant que ceux-ci ne passent pas la largeur ordinaire des rivières, ou la double portée du canon,”—or for the limitation of Grotius,³ which is of the vaguest character—“mare occupari potuisse ab eo qui terras ad latus utrumque possideat, etiamsi aut supra pateat ut sinus, aut supra et infra ut fretum, dummodo non ita magna sit pars maris ut non cum terris comparata portio earum videri possit.” The real question, as Günther truly remarks, is, whether it be within the physical competence of the nation, possessing the circumjacent lands, to exclude other nations from the whole portion of the sea so surrounded, or, as Martens declares in his earliest, and in some respects best, treatise on International Law, “Partes maris territorio ita natura vel arte inclusae ut *exteri aditu impediri possint*, gentis ejus sunt, cujus est territorium circumjacens.”⁴ To the same effect is the language of Vattel:

Tout ce que nous avons dit des parties de la mer voisines des côtes, se dit plus particulièrement et à plus forte raison des rades, des baies et des détroits, comme plus capables encore d’être occupés, et plus importants à la sûreté du pays. Mais je parle des baies et détroits de peu d’étendue, et non de ces grands espaces de mer auxquels on donne quelquefois ces noms, tels que la baie de *Hudson*, le détroit de *Magellan*, sur lesquels l’empire ne saurait s’étendre, et moins encore la propriété. Une baie dont on peut défendre l’entrée, peut être occupée et soumise aux lois du souverain; il importe qu’elle le soit, puisque le pays pourrait être beaucoup plus aisément insulté en cet endroit que sur des côtes ouvertes aux vents et à l’impétuosité des flots.⁵

Thus Great Britain has immemorially claimed and exercised exclusive property and jurisdiction over the bays or portions of sea cut off by lines drawn from one promontory to another, and called *the King’s Chambers*. And there is the high authority of Sir Leoline

¹ Papers presented to both Houses of Parliament by command of her Majesty, 1853. See 41 and 42 Vict., c. 67, § 6; and *post*, ch. xix.

² Lib. II, c. 1, s. 40.

³ *Ibid.*, c. III, s. 8.

⁴ *Præae Linæ Juris Gentium*, l. IV, c. IV, s. 110.

⁵ Vattel, *Le Droit*, etc., vol. I, l. I, c. XXIII, s. 291.

Jenkins,¹ that vessels, even of the enemies of Great Britain, captured by foreign cruisers within these *Chambers*, would be restored by the High Court of Admiralty. In time of war,² at least, the Solent, or the portion of the sea which flows between the Isle of Wight and the mainland, might, I think, be justly asserted to belong as completely as the soil of the adjacent shores to Great Britain.

CCI. Mr. Chancellor Kent states the claims of the United States upon this matter in the following language:

Considering the great extent of the line of the American coasts, we have a right to claim, for fiscal and defensive regulations, a liberal extension of maritime jurisdiction: and it would not be unreasonable, as I apprehend, to assume, for domestic purposes connected with our safety and welfare, the control of the waters on our coasts, though included within lines stretching from quite distant headlands, as, for instance, from Cape Ann to Cape Cod, and from Nantucket to Montauk Point, and from that point to the Capes of the Delaware, and from the South Cape of Florida to the Mississippi. It is certain that our Government would be disposed to view with some uneasiness and sensibility, in the case of war between other maritime powers, the use of the waters of our coast, far beyond the reach of cannon-shot, as cruising ground for belligerent purposes. In 1793 our Government thought they were entitled, in reason, to as broad a margin of protected navigation as any nation whatever, though at that time they did not positively insist beyond the distance of a marine league from the seashores; and in 1806 our Government thought it would not be unreasonable, considering the extent of the United States, the shoalness of their coast, and the natural indication furnished by the well-defined path of the Gulf Stream, to expect an immunity from belligerent warfare, for the space between the limit and the American shore. It ought, at least, to be insisted, that the extent of the neutral immunity should

¹ *Life of Sir Leoline Jenkins*, vol. II, pp. 727, 732, 755, 780. As to King's Chambers, see Selden, *Mare Clausum*, ch. 22, in which is a list of those Chambers as given by James the First, 1604.

² I do not think that the judgment of the Privy Council (1864) in the case of *The Eclipse*, 15 *Moore's P. O. Rep.*, p. 267, affects this proposition, but I think it right to cite the passage. (The question in the case was whether a collision between a British and foreign vessel in the Solent should be tried by the ordinary Maritime Law or by 17 and Vict., c. 104.) Their Lordships say: "In our opinion, the statute cannot be considered to have any local application to the Solent, and to affect foreign as well as British vessels navigating within the limits of that channel; and that, even if the statute were binding on all vessels navigating within a tidal river, which, however, the case of the *Fyenoord* (*Swab.*, 374) discountenances, we think that it could not be locally binding within the water of the Isle of Wight and the mainland, and that the circumstance that the Isle of Wight is by local and territorial designation to be deemed a portion of the county of Southampton does in any degree affect this question. We are of opinion that this collision must be considered to have taken place on the high seas, in a place where a foreign vessel has a right of sailing without being bound by any of the provisions of the statutes enacted to govern British ships. This being so, it follows that the Merchant Shipping Act has no application to this case, as it has been fully determined that where a British and a foreign ship meet on the high seas the statute is not binding on either. The principle, therefore, by which this case must be decided must be found in the ordinary rules of the sea."

correspond with the claims maintained by Great Britain around her own territory, and that no belligerent right should be exercised within "the chambers formed by headlands, or anywhere at sea within the distance of four leagues, or from a right line from one headland to another." In the case of the *Little Belt*, which was cruising many miles from the shore between Cape Henry and Cape Hatteras, our Government laid stress on the circumstance that she was "hovering on our coasts"; and it was contended on the part of the United States, that they had a right to know the national character of armed ships in such a situation, and that it was a right immediately connected with our tranquility and peace. It was further observed, that all nations exercised the right, and none with more rigor, or at a greater distance from the coast, than Great Britain, and none on more justifiable grounds than the United States. There can be but little doubt that, as the United States advance in commerce and naval strength, our Government will be disposed more and more to feel and acknowledge the justice and policy of the British claim to supremacy over the narrow seas adjacent to the British Isles, because we shall stand in need of similar accommodation and means of security.¹

CCI 4. Mr. Dana, in a very elaborate and able argument addressed, November 1877, to the Halifax Fishery Commissioners appointed under the Treaty of Washington, said:

As to the nature of this right which England claimed in 1818 to exclude us from the three miles by virtue of some supposed principle of International Law, I have stated² my opinion upon it; but your Honours will be pleased to observe that on that, as on the subject of headlands, an essential part of it, without which it can never be put in execution, there is no fixed international law. I have taken pains to study the subject, have examined it carefully since I came here, and I think I have examined most of the authorities. I do not find one who pledges himself to the three-mile line. It is always "three miles" or "the cannon-shot." Now, the cannon-shot is the more scientific mode of propounding the question, because that was the length of the arm of the nation bordering upon the sea, and she could exercise her rights so far as the length of her arm could be extended. That was the cannon-shot, and that, at that time, was about three miles. It is now many more miles. We soon began to find out that it would not do to rest it upon the cannon-shot. It is best to have something certain. But international writers have arrived at no further stage than this: to say that it is "three miles or the cannon-shot." And upon the question, "How is the three-mile line to be determined?" we find everything utterly afloat and undecided. My purpose in making these remarks is, in part, to show your Honours what a precarious position a State holds

¹ *Commentaries*, vol. 1, pp. 29, 30.

² *Argument of Richard H. Dana, Jr., on behalf of the United States*, November, 1877, pp. 18-20.

which undertakes to set up this right of exclusion, and to put it in execution. The international law makes no attempt to define what is "coast." We know well enough what a straight coast is and what a curved coast is; but the moment the jurist comes to bays, harbours, gulfs, and seas, they are utterly afloat—as much so as the seaweed that is swimming up and down the channels. They make no attempt to define it, either by distance, or by political or natural geography. They say at once: "It is difficult where there are seas and bays." Names will not help us. The Bay of Bengal is not national property: it is not the King's Chamber; nor is the Bay of Biscay, nor the Gulf of St. Lawrence, nor the Gulf of Mexico. An inlet of the sea may be called a "bay," and it may be two miles wide at its entrance, or it may be called a bay, and it may take a month's passage in an old-fashioned sailing-vessel to sail from one headland to the other. What is to be done about it? If there is to be a three-mile line from the coast, the natural result is, that that three-mile line should follow the bays. The result then would be, that a bay more than six miles wide was an international bay; while one six miles wide or less would be a territorial bay. That is the natural result. Well, nations do not seem to have been contented with this. France has made a treaty with England saying that, as between them, anything less than ten miles wide shall be a territorial bay.

The difficulties on that subject are inherent, and, to my mind, they are insuperable. England claimed to exclude us from fishing in the Bay of Fundy; and it was left to referees, of whom Mr. Joshua Bates was umpire, and they decided that the Bay of Fundy was not a territorial bay of Great Britain, but a part of the high seas. This decision was put partly upon its width, but the real ground was that one of the assumed headlands belonged to the United States, and it was necessary to pass the headland in order to get to one of the ports of the United States. For these special reasons the Bay of Fundy, whatever its width, was held to be a public and international bay.

This nice question as to jurisdiction over bays came before the Judicial Committee of the Privy Council in A. D. 1877. Lord Blackburn delivered the judgment. He said:

Passing from the common law of England to the general law of nations, as indicated by the text writers on international jurisprudence, we find an universal agreement that harbours, estuaries, and bays landlocked belong to the territory of the nation which possesses the shores round them, but no agreement as to what is the rule to determine what is "bay" for this purpose.

It seems generally agreed that where the configuration and dimensions of the bay are such as to show that the nation occupying the adjoining coasts also occupies the bay, it is part of the territory; and, with this idea, most of the writers on the subject refer to defensibility from the shore as the test of occupation; some suggesting, therefore, a width of one cannon-

shot from shore to shore, or three miles; some, a cannon-shot from each shore, or six miles; some, an arbitrary distance of ten miles. All of these are rules which, if adopted, would exclude *Conception Bay* from the territory of *Newfoundland*; but also would have excluded from the territory of *Great Britain* that part of the Bristol Channel which in *Reg. v. Cunningham*¹ was decided to be in the county of *Glamorgan*. On the other hand, the diplomatists of the United States in 1793 claimed a territorial jurisdiction over much more extensive bays, and Chancellor Kent, in his *Commentaries*, though by no means giving the weight of his authority to this claim, gives some reason for not considering it altogether unreasonable.

It does not appear to their Lordships that jurists and text writers are agreed what are the rules as to dimensions and configuration, which, apart from other considerations, would lead to the conclusion that a bay is or is not a part of the territory of the State possessing the adjoining coasts, and it has never, that they can find, been made the ground of judicial determination. If it were necessary in this case to lay down a rule, the difficulty of the task would not deter their Lordships from attempting to fulfill it. But in their opinion it is not necessary so to do. It seems to them that, in point of fact, the British Government has for a long period exercised dominion over this bay, and that their claim has been acquiesced in by other nations, so as to show that the bay has been for a long time occupied exclusively by Great Britain, a circumstance which, in the tribunals of any country, would be very important. And, moreover (which in a British tribunal is conclusive), the British Legislature has by Acts of Parliament declared it to be part of the British territory, and part of the country made subject to the Legislature of Newfoundland.²

CCII. In 1822 Russia laid claim to a sovereignty over the Pacific Ocean north of the 51st degree of latitude; but the Government of the United States of America resisted this claim as contrary to the principles of International Law.³

PIÉDELIÈVRE: Précis de Droit International Public ou Droit des Gens.
Paris, 1894.

Volume I, § 386, page 335.—The territorial sea.—We call the *territorial sea* the extent of sea over which the State from the shore

¹ *Bell's Crown Cases*, p. 72.

² *Direct United States Cable Company v. Anglo-American Telegraph Company*. L. R. 2 App. Cas., pp. 419–20.

³ Mr. Adams's letter to the Russian Minister, Mar. 30, 1822.

can exercise effective control. It is fictitiously considered a continuation of the land territory.

The contention is justified by divers reasons.

First. The security and independence of adjacent States require not merely that it should have exclusive possession of the shore but also that it may exercise its sovereign rights over that portion of the sea which washes its coasts and serves it, so to speak, as its border. To permit this free use to all without exception or conditions of any kind, to assimilate it to the high sea in free use, would be to expose a State to the most sudden and hence the most dangerous attack. It would deprive it of the fortifications raised by nature for its defense.

Secondly. The surveillance of ships which enter the waters of a State, depart from it, or are stationed there is required in the interest of an effective police and for the development of the political, commercial, and fiscal interests of that State.

Thirdly. It is legitimate for the adjacent State to appropriate the various advantages which the marginal sea may offer to it and thus assure the subsistence of its coastal population. The taking of transitory fish, of pearls, corals, etc., constitutes a valuable economic resource. They would lose almost all of the benefit of their favorable situation if they did not have the power to exclude foreigners from it.

§ 387.—*Extent of territorial sea.*—This question has given rise to very diverse opinions. The older authors were generally inclined to extend the limits in order to protect a State against the incursions of pirates or belligerent nations, since pirates infested the seas and the principles of international law at that time received little application. Some would have extended it to 60 miles, others spoke of 100 miles, others still fixed it at the distance of two days' navigation, which was absolutely arbitrary since this depends upon the speed of the vessel and the strength of the wind. Modern authors have likewise proposed different solutions. For some, the territorial sea would comprise all the waters within range of eyesight, but even this limit is uncertain, since it has the defect of varying according to the position of the observer, whether at the shore or at an elevation, and eyesight moreover varies with the individual; others used the criterion of the measurable depth of the waters. They would assign the character of territoriality up to the point where bottom can no longer be found with the sounding lead. That system deserves the same objections as the former. It is arbitrary and the limit thus fixed would vary with every State, depending upon the geological character of the coast.

The better opinion and that which seems to have been adopted definitely in practice is that of measuring the extent of the territorial sea by the greatest range of cannon. This solution plainly conforms to the nature of territorial waters—*terræ potestas finitur ubi finitur*

armorum vis. Only the space thus delimited is actually subject to the control of the adjacent State. It is only within these limits that it can enforce its laws and regulations, and in which the presence of foreign war vessels may threaten its safety. Beyond that, it could not be caused any disquietude. The actual extent of the power of defense is therefore the natural limit assigned to the territorial sea. This limit, as we have said, is termed the *line of respect*.

This extreme range of cannon is usually considered by treaties both of fishing and neutrality as 3 miles,¹ but this standard is neither general nor universal. It would be an error to conclude from it with some authors that the range of cannon was formally identified with the distance of 3 miles, and therefore this limit is actually the fundamental rule of the law of nations. It is certain that in the absence of all conventions the extent of the marginal sea is measured by the greatest range of cannon placed on shore, whatever that range may be. It is therefore subject to change with the progress of the art of firearms.

Moreover we may add that there is nothing to prevent the powers from fixing among themselves by special conventions a different extent to their marginal seas. It is merely to be noted that the limit thus determined is obligatory upon the contracting powers alone, third parties remaining subject to the general rule of law. Likewise, every nation may by special laws, usually promulgated with a view to surveillance or the control of customs or fishing rights, fix a special delimitation for itself and other States which consent to it. Thus in France the limit with respect to the control of customs is extended to 2 myriameters.

[Piédelièvre then speaks of the different rights of the adjacent State in the marginal seas, and names first the right of regulating and even reserving to its nationals the coastal fishing. He says:]

It is the duty of the adjacent State, justified by various considerations, economic and political, to guarantee these privileges. . . .

The right of fishing may be reserved to nationals either by the municipal law or by treaties. Both systems have their advantages and disadvantages. The treaty is effective between contracting parties alone, while a law has a more general effect; besides, the law may be usually modified if experience shows it is defective, whilst a treaty, a synallagmatic act, can not be changed without the consent of the signatory States; but on the other hand, conventions have the advantage of being more uniform, since they apply to diverse States and more efficaciously avoid difficulties than a statute, since it is their principal object. In general, States usually make a reservation of

¹ Three marine miles, equivalent to 5,555 meters. See the treaty of October 29, 1888, concerning the Suez Canal, *post*, p. 487.

coastal fishing not merely in their treaties but also in their municipal regulations. . . .

§ 397, page 346.—States may exercise the right of police in their territorial waters.

This right is required and at the same time limited by the security and defense of the territory, the security of the coastal population, and the protection of commercial and fiscal interests of the country.

A State may likewise for the same purpose establish sanitary regulations. . . .

The fiscal and commercial interests of the adjacent State likewise require the exercise of the *customs police* in its territorial waters.

The radius of this customs surveillance is more extensive than that of the territorial sea. It is easy to justify this extension. Indeed, if the frontier were to stop at the boundary line of two States it would be easy to fraudulently introduce prohibited or dutiable articles over the boundary. It is permitted therefore to extend the radius of surveillance and to fix beyond the boundaries a space in which the customs regulations may be applied in all their force. The necessity of a wider frontier for this purpose applies as well to terrestrial as to maritime frontiers. Thus in France the extreme customs radius, after having been fixed at 2 and later 4 leagues, has by the law of March 27, 1818 [1817] (Article 13), been established at 2 myriameters. It has been claimed that this limit is excessive, as it exceeded the extent of marginal sea; but we do not think so. The extent of the customs radius should not be considered merely as a reciprocal concession of States based upon their tacit consent, but rather, as has been remarked in the matter of sanitary police, as a result of the exercise of their respective rights. Moreover, the question has little practical interest since the progress of artillery has given modern cannon a range equal to if not greater than the distance just indicated. . . .

§ 414, page 361.—Ports, harbors, and roadsteads are considered susceptible of possession and ownership, and the corresponding rights may be exercised over them. In the majority of European legislations they are a part of the public domain. . . .

To the principle of the liberty of access of ports, harbors, and roadsteads, practice and doctrine, however, admit a double derogation: First, no one denies that States may forcibly close the entrance to their military ports or maritime arsenals; secondly, they may likewise forbid access of commercial ports to war vessels, but to those only. . . .

Treaties usually contain stipulations governing the entrance, sojourn, and departure of war vessels.

§ 417, page 363.—*Gulfs and bays*.—Are gulfs and bays or considerable portions of the sea which encroach upon the land to be considered as subject to the territorial sovereignty of the adjacent State? The general rule makes them part of the territorial sea when their extent is such that it is not impossible to defend their entrance from the shore. That is to say, they are under the sovereignty of a riparian State when they do not exceed in width the double range of the cannon placed on the shore, or when their entrance may be protected by artillery or is naturally protected by islands, banks, or rocks. In all these cases it is evident that gulfs and bays are within the control of the State, proprietor of the land which incloses them. This State has the actual possession.

As to gulfs and bays which do not fulfill one or the other of these conditions they are free as the sea of which they constitute a natural part, except that portion corresponding to the marginal sea of the adjacent State, which is subject to the principles heretofore enunciated.

Practice generally accepts these solutions; thus, Article 9 of the Anglo-French Convention of August 2, 1839, regulating fishing in the English Channel, accords to the adjacent State the exclusive right of fishing in the bays whose width does not exceed 10 miles at the narrowest point of the land or sand banks. Likewise, an opinion of the British Board of Trade of November, 1868, accepts the fishing limits established by the North German Confederation on the German coasts and recognizes the exclusive right of German fishermen to fish in the interior bays or indentations of the coasts, having a width of 10 miles or less at the narrowest points of the land and sand banks.

PRADIER-FODÉRE: *Traité de Droit International Public*. Paris, 1885.

Volume II, § 617, page 147.—Territorial seas.—The extent of an open sea over which the State, from the coast, can cause its power to be respected, is placed within the maritime territory of that State. This is what is called the neighboring sea, the adjacent sea, the territorial sea, the littoral sea. Certain authors more particularly characterize as *littoral seas* those parts of the ocean which wash the coasts of a State and as *territorial seas* the gulfs, roadsteads, bays, and, in general, the waters which are surrounded by the possessions of a single State. But I do not accept this distinction, and I maintain that *littoral seas* are *territorial seas*, since they are a part of the territory. With justice, then, the territorial sea has been defined as that which washes the coasts of a State and serves it, so to speak, as its boundary. It is, following the expression of Vattel, "the sea near the

coast"; according to G. F. von Martens, it is, "those neighboring parts of the sea (*mare proximum*) susceptible of being controlled from the shore"; or, according to Klüber, "those parts of the ocean which adjoin the land territory of the State, to the extent at least, following the opinion generally adopted, that they are within the range of cannon placed on the shore." In a word, the territorial seas are those parts of the sea which wash the coasts which border immediately upon them and serve them in some manner as frontiers. A British law of 1878, on the jurisdiction over territorial waters, has defined the territorial sea, "the portion of the sea adjacent to the coasts of the United Kingdom, or to the coast of any other part of the possessions of his Britannic Majesty."

The shore, or coast, includes all the space comprised between the sea and the line to which the highest tides extend, or which the strongest waves attain. The French marine ordinance of 1681 provides that "the shore and coast of the sea is to embrace all the land which is covered and uncovered during the periods of new and full moon, and over which the great tides of March can extend on the beaches." . . .

§ 619.—Sovereignty and jurisdiction of the State does not, therefore, end on the shore, but extends beyond that—over a part of the sea which washes it. This prolongation of the jurisdiction and sovereignty of a State is thus justified by Vattel:

The various uses to which the sea near the coasts can be put render it a natural object of ownership. Fish, shells, pearls, amber, etc., may be obtained from it. Now, with respect to all these things, the sources of coast seas are not inexhaustible, so that the Nation to which the shore belongs may claim for itself an advantage thus within its reach and may make use of it, just as it has taken possession of the lands which its people inhabit. Who can doubt that the pearl fisheries of Bahrein and Ceylon may be lawful objects of ownership? And although the supply of fish is less easily exhausted, yet if a Nation has specially profitable fisheries along its coasts, of which it can take possession, are we not to allow it to appropriate that gift of nature as being connected with the territory it occupies, and to keep to itself the great commercial advantages which it may enjoy, should there be fish enough to supply neighboring nations?

A nation may appropriate to itself those things, the free and common use of which would be harmful or dangerous to it. This is a second reason why the powers extend their domain over the sea and along the coasts as far as they can protect their rights. It is of importance to the safety and welfare of their States, that it shall not be freely permissible to all the world to approach so close to their possessions, above all with war vessels, and they may use the necessary measures to prevent access to commercial nations and interference with their navigation.

Hautefeuille and other authors, who wrote after Vattel, have paraphrased this text:

The sea adjoining the coasts (says Hautefeuille) produces special products in different regions, which man has succeeded in appropriating to himself. These products assure the subsistence and wealth of peoples. Fishing of transitory fish, as well as that of pearls, coral, etc., carried on in the space of water actually under the subjection of the territorial scepter, are a valuable resource for the adjacent population. They would lose almost all the advantage of their situation if they had not the power to exclude other people from these fisheries. Almost all the peoples of the civilized world are essentially commercial. Commerce is to-day the greatest source of power and prosperity of nations. To admit the liberty of the territorial sea would be to annihilate the actual basis of international commerce and to deprive the majority of maritime States of the immense advantages which they derive from their commerce. The riparian people have a powerful interest to keep others off the coasts. The parts of the sea which immediately wash the coasts form, so to speak, the ramparts, the line of defense of these coasts. To permit the free use of it to all, without exception or condition, in a word, to assimilate these parts to the high sea for absolute liberty to all would be to expose the States washed by the ocean to the most sudden and unforeseen aggressions, consequently those most difficult to repel. It would be to deprive these States of the fortification raised by nature for their defense.

The maritime boundaries (says Ortolan) are by their nature susceptible of an unforeseen attack of sudden invasion. Contraband and fraudulent commerce can be organized there on a large scale. The nation may, therefore, exercise over vessels of all kinds, which attempt clandestinely to approach its coasts and even over those which come too near, a most extended right of surveillance.

The prolongation of the sovereignty and jurisdiction of the State over the parts of the sea which immediately touch its coasts, forms, so to speak, the defensive line of its shore and may be considered the continuation of its frontier; and is, therefore, based upon the duty which is imposed upon the State to exclude other peoples from the free use of the adjacent waters for the purpose of retaining the advantages which may be derived from the parts of the sea which wash the shore and assuring the defense of the land territory as well as the protection of the commercial and fiscal interests of the country.

§ 620.—Authors discuss the question as to the nature of the right of the adjacent State over the territorial sea. Some contend that it is merely a right of imperium, others that it is a right of property, while others claim both rights at once. We have seen that, following Vattel, "the diverse purposes for which the sea near the coast may be used render it very susceptible of ownership." G. F. von Martens

declares that "A nation may assume the exclusive right over the adjacent parts of the sea susceptible of being controlled from the shore," and his annotator of 1864 adds, perhaps a little loosely, that the publicists agree in attributing the ownership of the territorial sea to the adjacent State. Klüber considers "the parts of the ocean which border upon the land territory of a State" as "susceptible of an exclusive possession." . . .

§ 621.—As a consequence of these different doctrines authors who pronounce themselves in favor of the right of property declare that the riparian State can, "whatever be the state of the sea (territorial) during great tempests, force the individuals who find themselves upon this sea to respect its laws or punish them for having violated them. It may expel vessels which, against its law, seek to approach it, and destroy them if they refuse to carry out its orders."¹ "That the narrow space of the ocean which washes the shore is reserved"; that "it is affected with the sovereignty of a nation which can exclude others from it"; that "the State owning the shore can forbid navigation or certain kinds of navigation within the extent of its territorial sea, can limit the number of war vessels which may approach its coasts, and subject merchant vessels to the visits of customs officers and to the payment of certain dues, etc."² Heffter says that the adjacent States enjoy certain incontestable rights, which are: First, the right of demanding an explanation as to the object of the voyage. If response is refused or if it appears inexact, the local authorities may, by direct means, take cognizance of the true object of the voyage and in case of necessity take the provisional measures required by circumstances. Secondly, the right of preventing that the peace be broken within its interior waters and intervening *de facto*. Thirdly, the right of establishing regulations as to the use of the waters washing its coasts; for example, the right of regulating the different kinds of fishing. Fourthly, the right of placing an embargo, and assigning cruisers to prevent contraband. Fifthly, the right of jurisdiction. But authors who only admit a right of surveillance and jurisdiction refuse to the bordering State the right of declaring the closure of the territorial sea, as they declare the closure of one of their ports; the right of imposing a tribute or toll upon vessels which pass through it, as if they pass into water belonging to them, unless they erect works or proper aids to navigation in localities where their establishment and maintenance in the interest of general navigation is required and for which this toll would serve as a legitimate indemnity; the right to seize vessels, or sequester or expropriate merchandise by administrative measures. The same authors accord to the adjacent State the right of establishing rules and the necessary laws to insure upon the

¹ *Hautefeuille, Droits et Devoirs*, I, p. 84.

² *Ibid.*, p. 86-87.

territorial sea the general defense of the country and of its public interests against attacks of which it may be the object, as well as the defense not merely of its nationals but of all its inhabitants, even aliens, in their individual interests, against wrongs of any kind which might be inflicted upon them, and to employ the public forces to execute its laws and regulations upon this territorial sea. "Every State," says Fiore, "can alone see to it that its laws are observed and can bring before the judicial branch those who contravene its provisions of law."

§ 622.—I confess that it is difficult to understand how an adjacent State can exercise sufficient surveillance, can render its right of jurisdiction over the territorial sea effective, can prevent attacks and wrongs, can make rules and regulations to protect its territorial, political, and fiscal interests, as well as the individual interests of its nationals and inhabitants, can punish contraventions, and can employ a public force to support its right of surveillance and jurisdiction without interfering in a special case with foreign navigation in its territorial waters and without having recourse to rigorous measures. Nor do I understand the right of subjecting to the judicial power delinquents whom it has been impossible to seize. The exercise of the right of legislative surveillance and jurisdiction over the territorial sea necessarily involves the employment of preventive measures, rigorous if necessary. What these authors wish to say, which Vattel explains with much more simplicity and without contradictions, is that "these parts of the sea thus subjected to a nation are embraced within its territory." You can not navigate there against its will, but it can not refuse access to vessels not suspected, having innocent objects, without transgressing its duty, every owner being obliged to accord passage to aliens, even on shore, when this is without damage or peril to itself. It is true that it itself is the judge of each particular case, and if it judges badly it offends others, but others must submit. It is not the same with cases of necessity, as, for example, where a vessel is obliged to enter a roadstead which belongs to it in order to escape the severity of a storm. In this case . . . the vessel can legitimately enter in spite of it, if entrance is refused unjustly.¹

§ 623.—Although the question of establishing the nature of the right of the adjacent State over the territorial sea appears to me to be idle, I shall, however, state that this right appears to me to be that of ownership. To demonstrate this it is not necessary to say that the territorial or littoral sea is as accessory of the land, and that as the accessory following the principal it necessarily becomes the property of the possessor of the land. Still less need we allege that the bottom of the territorial sea is the geological prolongation, more or

¹ Vattel, Pradier-Fodéré's edition, vol. 1, p. 577.

less recognizable, of the shores. Such arguments have only a minimal value. I support my opinion upon the three conditions which are necessary to constitute the essential character of an object subjected to a right of ownership:

1. The object must be useful.
2. The object must be of such a nature that its use by several or all would be harmful to the use of him who claims ownership.
3. The object must be reduced to the actual and material possession of the proprietor. . . .

§ 630.—The adjacent State having the right of taking all necessary measures within the territorial sea for the security of their land territory to prevent contraband, protect national fisheries, etc., we must examine the extent of this space which is reserved to them. This question has given rise to numerous different opinions. Bluntschli states that "the sovereignty of the State over the territorial sea extends, in general, to the distance of a stone's throw from the coast. It later extended to the distance of an arrow shot." Frightened by audacious enterprise of pirates, with which the sea was infested, and preoccupied by the custom, during the middle ages, of making maritime excursions without declaring war, the ancient authors extend the limits of maritime territory very far. The writers of the sixteenth century in general fixed the limits of the maritime domain at 60 miles. Casaregis and d'Abreu fixed it at 100 miles. Loccenius speaks of two days' journey without a thought that this distance would vary with each voyage, depending upon the sailing qualities of the vessel. Sarpi contended that the extent of the territorial sea was proportionate to the importance of the adjacent State, and said that "States are the masters of all the property of the sea of which it is necessary for them to take possession without harming other peoples," which opened the way to all the abuses of force, in spite of the restriction which he placed upon it. Valin subsidiarily adopted the opinion, fixed by many treaties of that time, that the maritime domain extended to two leagues, but he also proposed to consider as the territorial sea of the adjacent State the entire extent of the adjacent sea in which the bottom could be found, and for the coast with respect to which this standard of measurement was inapplicable he believed that the extent of jurisdiction over the sea ought to be limited by the range of cannon shot and not beyond that. Others proposed bases of measurement still more vague, for example: The length of a race course, or as far as the human voice could be heard from the shore. Rayneval thought that the most just measurement would be the range of eyesight from the coast; that is, the actual horizon, or rather the visual horizon, without taking into account the fact that this horizon changes with the degree of elevation of the observer, and leaving out of account whether he would

have recourse to marine glasses or would be limited to the naked eye, which would naturally vary with each individual. Bynkershoek raised these various questions in his *De Dominio maris*, chapter 2. Finally another opinion, more conformable to the notion of the territorial sea, says that maritime dominion stops at the place where continuous possession ceases, in which the proprietary State can no longer exercise its power, the place from which it can no longer exclude foreigners, and from which it has no longer any interest in excluding them. This would make the territorial sea, or littoral sea, only that portion of the sea which can be dominated from the shore, or which can threaten the coast by engines of destruction fixed in the sea, that is, the space covered by projectiles discharged from the shore; or, in other words, the space delimited by the greater range of cannon placed upon the shore. This space alone is actually subjected to the power of the territorial sovereign. There alone can he effectively execute and enforce his laws and regulations, within this limit the presence of foreign vessels can threaten his security, beyond that it is a matter of indifference to him. It can cause him no uneasiness, for beyond the range of cannon they can not harm him. "The jurisdiction over a portion of the sea," said Grotius, "can be acquired by the [sovereign of the] territory, when, from the land, the law may be imposed upon those who pass through the adjacent parts of the sea, in the same way as if they were located upon the land." (Grotius, *Droit de la Guerre*, etc., Pradier-Fodéré's edition, vol. i, p. 448.) Bynkershoek states the principle that "the sovereignty of the land sovereign ends at the place where the force of arms ends." (*De dominio maris*, chap. ii.) Vattel says: "Each State may regulate as it thinks best," etc.¹

§ 631.—As a matter of fact the question of the extent of the territorial sea is established by the usage of States and by conventions. Thus a common usage has established the range of cannon shot as denoting the space designated by the name territorial sea, and this custom has been fixed by laws and regulations of many States as well as by their conventional law. We may therefore consider the formula of Bynkershoek, that "the sovereignty of the land ends where the force of arms ends," as having to-day become the general rule of international law. We may regard the two following points as having become generally accepted and observed. First. The territorial sea embraces all that part of the sea washing the coasts embraced within the range of cannon shot from the shore. Second. The distance commences to be measured only where the sea actually becomes navigable.

§ 632.—Although this is certainly very simple and although the experienced eyes of sailors are fairly certain of the range of cannon,

¹ See *post*, p. 458.

we must, however, recognize that this line accepted in general law does not offer an invariable basis. The range of cannon increasing with the progress of the art, the extent of the territorial sea is, in fact, bound to advance accordingly. Thus whilst the line of cannon shot heretofore was minimal it is to-day considered ordinarily as 3 miles. The distance adopted by the majority of States, calculated from low-water mark, is 3 geographical miles, 60 to the degree of latitude, and we may therefore see how, in view of the perfection in the art of artillery, it would become necessary to modify this mode of limiting the maritime territory. New cannons have a range of 5 English miles, and the question has been asked whether the distance is not too restricted. Mr. Seward raised this question in 1864 in a note to the British Legation at Washington. Even before his time, having in mind that the limit fixed by the range of cannon being a standard, like every human invention, merely relative, and every progression in the art serving to displace established frontiers the wish was expressed that the States agree upon a definite mathematical extent of the territorial seas employing a uniform standard.

§ 633.—If the distance of 3 geographic miles, calculated from low-water mark, in a way forms accepted law, nothing prevents States from fixing among themselves by treaty a different limit to the territorial sea. But the extent thus fixed is simply obligatory upon the contracting parties, and other powers not parties to the treaty or who have not admitted it remain subject to the common law. Ortolan, in this connection, expresses the opinion that “special treaties, while substituting a more definite standard in exact figures for that of the range of cannon, ought but slightly to depart from the latter under penalty of putting themselves in opposition to the principles of reason upon which the special control of the adjacent State over the territorial sea are founded.”¹

Independently of treaties the laws of each State may also fix unilaterally a certain distance in the sea within which these States may claim to exercise their control and jurisdiction and which then constitute for that State and those who admit this delimitation the established territorial sea. But it is principally for the surveillance and control of customs that such a special limitation is established.

§ 634.—As the coasts of the sea do not present a straight and regular line, but, on the contrary, are almost always indented by bays, headlands, etc., the maritime domain can not be measured from each point of the shore, but in practice it has been agreed to draw an imaginary line at an appropriate distance from the shore, which is then to be considered as the maritime frontier—the artificial limit.

¹ Vol. 1, p. 159.

Ships finding themselves within this line, called *line of respect*, and the shore, are said to be within the territorial waters of the State, whose rights of property, sovereignty, and jurisdiction this imaginary line limits.

§ 635.—In order to maintain its continuous possession over the territorial sea and maintain the right of enforcing its authority, it is not necessary that the adjacent State maintain fixed and permanent batteries upon the shore washed by the sea nor establish fortresses on this shore. Hautefeuille observes that the absence of this means of coercion, that even the temporary or permanent disarmament of part of the shores of the sea can not affect this right. The State, sovereign of the land washed by the tide, is by that fact alone sovereign of the territorial sea and exercises this right over the latter as it does on land in a way conformable to its interests, the *mode* of exercise not diminishing its actual right. “Within the line of respect the foreigner,” say Pinheiro-Ferreira, “even in the absence of all force, ought to conduct himself as if he were on the territory of the country and undertake nothing which the government would have the right to prevent as being an infringement on the property or security of that State.”

§ 636.—It has been said that States may unilaterally—that is, without treaty—determine for themselves and other foreign States who admit the delimitation, a special extent for the territorial sea, particularly in the matter of surveillance and control of customs. In France, for example, by virtue of the law of 4th Germinal, year II, the radius of the maritime customs frontier extends 2 myriameters seawards from the coast, and the court of cassation decided that the coasts are the places washed by the waters of the sea at low-water mark. . . .

§ 637.—States may also establish for themselves, without treaty, a special extent of the territorial sea for the exercise of fishing rights, but this delimitation can have only such force as against other States as the latter admit, which does not easily happen. There are maritime States which have claimed that the extent of the sea reserved for the exclusive profit of inhabitants of the coast for fishing ought to be greater than that reserved for the defense of the territory. Thus Denmark claimed to exercise the exclusive right of fishing in the sea of Greenland, and subsequently restricted its claim to 15 miles of the coast, basing their right on possession recognized by treaties, but other States have refused to lend recognition to its claims. The distance within which maritime powers have the right of regulating fisheries on their coasts and forbidding foreign fishermen to ply their trade is usually determined conventionally by States, and this distance to-day is generally 3 miles. In the convention concluded at

Paris, November 11, 1867, between France and Great Britain on the subject of fishing, it was stipulated:

That French fishermen shall enjoy an exclusive right of fishing within a radius of three miles from low-water mark along the coasts of France, and British fishermen shall enjoy the exclusive right of fishing within the same radius along the coasts of Great Britain. The radius of three miles fixed as the general limit for the exclusive right of fishing on the coasts of the two countries shall be measured in the case of bays whose openings do not extend 10 miles from a straight line drawn from one headland to the other. . . .

The distance of 3 miles has been likewise adopted in a fisheries treaty relating to Newfoundland concluded at London January 14, 1857, between France and Great Britain which, moreover, although ratified, was not put in execution and was considered null and void because the Provincial Legislature of Newfoundland refused its sanction.

§ 638.—When two or more States have conventionally agreed upon a special delimitation, when they have fixed precise distances even more extended than that of the range of cannon in order to prevent frauds in matters of customs, or to protect coastal fishing, the distance agreed upon is only obligatory between the contracting parties for the special purpose for which it was established. For all other purposes, if there are no conventions or special clauses or specially accepted regulations, we must recur to the common standard of measurement and the general principles controlling in the territorial sea. . . .

§ 661.—*Gulfs*.—Gulfs are parts of the sea which encroach upon the land. Bays are kinds of gulfs in which ships are sheltered from certain winds. Gulfs of smaller extent and more specially bays whose extent is generally restricted, are within the sovereignty of the State into which the part of the sea which forms them encroaches, but gulfs of wider extent such as the Gulf of Lyons and the Bay of Biscay are in reality portions of the sea, entirely open, whose complete assimilation to the high seas it is impossible to deny.

§ 662.—Some States have, however, made claim that bays and gulfs situated between two headlands belonging to them ought to be considered as their property whatever their extent. Such is the claim, for example, of Great Britain, which, under the name of Kings Chambers treats as its own all the extent of sea contained within an imaginary line drawn from one headland of English territory to another. These Kings Chambers sometimes comprise considerable stretches of sea but this is only a pretension which theoretic law denies and which can only prevail by its support by force. Grotius, too often cited without having been read, admits that—

the sea can be occupied by him who possesses the land situated on both shores, if this area is open at the mouth like a gulf, provided that that part of the sea is not of such an extent that being compared to the land it can not be deemed to constitute a part of it.

When Vattel speaks of bays and gulfs which belong incontestably to the State the territory of which they encroach upon, he has only in view

those bays of small extent and not those wide stretches of water to which these names are sometimes given, such as Hudson Bay, . . . over which sovereignty could not extend, much less ownership. A bay whose entrance may be defended may be occupied and subjected to the laws of the sovereign. This is necessary since the country could be much more easily invaded or attacked at those places than on the coasts open to the winds and impetuosity of the tides.

The rule generally expressed and moreover observed by all States is that bays and gulfs are unquestionably a part of the territorial sea unless they have such an extent that it is impossible to defend their entrance from the shore. All the curvatures surrounded by the lands of a single State when their width does not exceed the double range of a cannon shot or when their entrance may be controlled by artillery, or when they are naturally defended by islands, lakes, or rocks, are considered as constituting a part of the adjacent State and as accessories to the land. "In all cases," says Ortolan, "it is correct to say that these gulfs and bays are within the territory of the State that is master of the lands which surround them." It has the physical power to continuously operate within these waters; except for conventions, either express or tacit, it may exclude ships of war of every other State from it; and this right is based upon the reciprocal independence of peoples which authorize them to judge for themselves of the manner in which this right is to be exercised. We may add to these reasons, justifying the right of sovereignty of the State over gulfs and bays, the consideration that these indentations form a safe anchorage, because the adjacent coasts break the currents and waves and shelter vessels against the impetuosity of the winds. So that ships which anchor there are under the protection of the shores and consequently under the protection of their sovereign, whose sovereignty they must recognize as soon as they place themselves under its control. Thus, bays, and gulfs are considered as comprised within the domain of the territorial sovereign if their extent is not such that it is impossible to defend their entrance from the shore. In other words, if they may be defended either by maritime force, by the cross fire of cannons placed at their entrance, or naturally by rocks, sandbanks, islands, etc. But the principle of the liberty of the seas is not to be modified with reference to bays and gulfs of wide extent. We

must apply to them the principles set forth with reference to the territorial sea.

§ 663.—*Ports, harbors, and roadsteads.*—"Ports and harbors," says Vattel, "are again manifestly a dependence and a part of the land itself, and consequently they belong in ownership to the nation. We may apply to them with reference to the effects of domain and sovereignty all that has been said upon the subject of the land itself." Klüber considers as belonging to the maritime territory of States "the parts of the ocean contiguous to the continental territory in which vessels, either naturally or by artificial means, are more or less sheltered from tempests, and in which the entrance and sojourn of vessels may, at will, be prevented." It results from the very nature of things, from the situation of the places themselves, and from the territorial sovereignty under which they are necessarily placed, as dependencies, that ports, roadsteads, and harbors belong to the nation mistress of the shores on which they are found. The nation mistress of the land has them incontestably within its power. It may materially remove from them all foreign activity, can likewise exercise in fact and permanently that physical power which constitutes possession. The ownership of a people over the ports, harbors, and roadsteads of their territory does not, moreover, prevent other nations from freely navigating the seas and communicating with them. . . .

§ 880, page 447.—If, as we have said, the high seas can not be subjected to the sovereignty of any power, if all nations may navigate in the open sea without ever being subject to prohibitions or duties established by the laws of the nearest States, nor to any act of authority of a foreign power; if in the open sea all States have equal rights, and if no State can, without the abuse of force, seek to give effect to its rights over those of another, there are nevertheless some acts of jurisdiction which are possible by virtue of usage or international agreement. The liberty of the seas existing only in the interests of the security and intercourse of peoples, usage, and treaties of maritime nations have introduced certain special measures of surveillance, inspection, or police for the purpose of effectively policing the sea. Thus, the right of visit in the open sea in time of war, a right which rests upon the absolute necessity of belligerents to forbid acts of hostilities even on the part of neutrals, as well as the measures taken against the slave trade, are restrictions upon the principle that the high sea is free and subject to no State. The right of navigation is likewise subject in its exercise to the rules generally followed or specially agreed upon to avoid collisions. When these measures of surveillance, inspection, police, and navigation result from special or reciprocal treaties they are only obligatory upon the contracting parties.

RÆSTAD: La Mer Territoriale. Paris, 1913.

XI. THE THEORY OF THE CANNON RANGE: CRITICISM OF THIS THEORY.¹

Page 160.—Introduced into the history of international law by Cornelius van Bynkershoek and repeated from the middle of the eighteenth century by the great majority of authors, the rule of the cannon range has finally come to be regarded as pretty nearly an axiom. In our days, authors with few exceptions still see in the cannon range the true basis of calculation of the limit of the territorial sea. In support of their thesis they always employ, with some additions or corrections, the arguments of Bynkershoek. They maintain in the first place that inasmuch as sovereignty depends, for its exercise, on the material force at the disposal of the sovereign, it can only be recognized to the extent that it is supported by force; now, the force which a riparian nation can exercise constantly over the adjoining sea is the force of cannon placed on the shore. As far as the cannons carry, just so far does the maritime sovereignty of the coastal nation extend. Bynkershoek declared that he assigned the same rights to armed as to unarmed countries; likewise, modern authors hasten to add that the power of cannon must be regarded as the ideal measure of the sovereignty of a nation bordering on the sea, and that the range of cannon is the true limit of the territorial sea even if there are no cannon placed on the shore. Certain authors, taking into account the mode of calculating the maritime territory which has been adopted in fishery conventions and which consists in measuring the three miles from low-water mark, are of opinion that the extent assigned to the territorial sea should be the distance at which a hostile ship would succeed in hitting with its cannon balls the land left uncovered by low tide. Only thus is it possible to maintain, while adhering to the cannon-range theory, the calculation of the fishery conventions starting at low tide; obviously the sovereignty of the coastal nation can not be maintained in a constant manner by cannons placed on the land between the two tides. With regard to the specific limits adopted nowadays by the nations, authors assume different attitudes. Some are of opinion that the limit of cannon range is, in spite of everything, the limit of the law of nations, and that the nations might, if they wished, and even ought to, adopt the limit of the actual range of modern cannon except in relations regulated by international conventions. Others confine themselves to saying that, as the nations have by almost unanimous agreement substituted the three-mile limit for that of cannon range, it is necessary,

¹ Mr. de Lapradelle has already very vigorously criticized this theory. *Revue générale de droit international public*, 1898, pp. 284, 309; see *ante*, p. 188.

pending a better solution, to regard the three-mile limit (equivalent to cannon range) as the limit of the law of nations.

What is maritime territory and the sovereignty exercised thereover by the riparian nation? I have demonstrated in the preceding chapter that the maritime territory and the terrestrial territory of one and the same nation have been constituted, by the force of things, in two distinct manners, and that the sovereignty exercised by the coastal nation over the maritime territory differs from that exercised by the same nation over the terrestrial territory. The territorial sea is, as has been said, a dependency of the coastal nation, an adjunct of its terrestrial territory. It is necessarily an adjunct in the sense that men, being unable to inhabit the sea, exercise their rights over the sea from the land. At sea, men can be nothing but nomads. But the sea is not an indispensable adjunct to the land in the sense that every maritime nation must necessarily have a maritime territory. History teaches us that it is by a slow and tedious evolution that the nations have asserted their rights at sea. And it is by a fortification of the rights thus acquired, which fortification is only a century old, that the nations have arrived at the maritime sovereignty of which they boast to-day. From a historical standpoint the territorial sea has not arisen from an occupation of the sea, but from the successive exercise of certain rights at sea, which later on grew into an aggregate called sovereignty by common agreement.

I hope more specially to have demonstrated that the limit generally adopted for determining the extent of the territorial waters is the three-mile limit, as an independent measure, and not cannon range converted into three miles. But let us admit for the sake of argument that the three-mile limit is the mere equivalent of cannon range. Is it quite certain that the cannon range limit known to the jurisprudence of former centuries arose from the aforesaid idea, namely, that the control of the riparian power extends as far as it can be maintained from shore? What have been, in other words, the considerations that have caused cannon range to be adopted as the limit of neutral waters?

In the seventeenth and eighteenth centuries it was not the question of the safety of the coasts that was primarily considered. To be sure, a naval battle waged a short distance from the coast might cause inconvenience to men and things situated on land.¹ But it must be remembered that, up to the end of the eighteenth century, it was chiefly a question of the capture of merchantmen by privateers, which capture could not involve a naval battle in the real sense of the word. By upholding the neutrality of its territorial waters, the coastal

¹ An instance of this is afforded by the countermanifesto of the States General on the occasion of the declaration of war of March 12, 1781 (Rayneval, *De la liberté des mers*. vol. II, p. 250).

nation aimed at the protection of maritime commerce. In order to determine the limits of the neutral waters it was therefore of the highest importance, as the Spanish author d'Abreu pointed out, to know to what distance neutral navigation extended from the coast. A limit which was very often applied in the seventeenth and eighteenth centuries was the range of vision. And not without reason. The fact that a ship approached a land until it sighted the coast raised the presumption that the ship wished to come up to the land. But the limit of vision, by considerably extending the territorial waters, was troublesome to belligerent powers, which at that time tried above all to destroy the enemy's commerce. It was necessary to seek a measure better adapted to the interests of belligerent nations while at the same time not injuring too greatly the interests of neutrals. The measure of cannon range was available, was known to seamen, and had even been employed at a very early date to designate either the extent of the protection offered by fortified ports, or the respectful distance that a foreign armed vessel was bound to observe in approaching a fortress or else a merchantman liable to search. It would have been possible, of course, to use the ordinary units of measurement, *viz*, leagues or miles. But the terms league and mile, not having the same meaning in two different countries, could not without inconvenience be used in rules of international application. Then, the cannon range measurement commended itself for an apparently philosophical reason. It spared the nations professing to use it the disagreeable necessity of haggling with the nations which maintained broader limits. To offer cannon range instead of four leagues was far better than offering one scant league and, as a matter of fact, it was the same thing.² On the other hand it is impossible to tell exactly whether, in the time of Mr. de Martangis or of the first treaties between England and the Barbary States, this cannon shot which served abstractly to delimit neutral waters was imagined to come from the land toward the sea or from the sea toward the land. Later on, it is true, the terminology of the treaties and neutrality declarations, conforming to the prevailing doctrine, designated the land as the point of departure of the imaginary cannon shot.

But, if the range of cannon was finally calculated as starting from the land, this was purely conventional. Respect for the coast, as mentioned by de Martangis, was never maintained from land by cannon placed on shore. It was maintained by coast-guard vessels and by war ships, just as respect for the territorial limit in matters of custom houses and sanitary regulations is enforced by cruisers. The fortifications which are situated on the seacoast in certain countries are not intended for the maintenance of neutrality at sea; their

² See the Dano-Dutch incident in regard to the Iceland fisheries.

purpose has been to prevent landings and attacks from seaward. Being called upon to go into operation when the coastal nation is itself implicated in a war, they have nothing to do with the preservation of neutrality at sea. Furthermore, there are no means on land of making the examinations and giving the summons which must precede every punishment of a supposed breach of respect for the coast.

The analogy of the protection offered by fortified ports certainly did, in the eighteenth century, contribute powerfully toward the adoption of cannon range as the limit of neutral waters along unfortified coasts. But, while accepted by analogy, this limit nevertheless fails to possess the character assigned to it by the doctrine on the subject. As to the limits of the zone reserved for national fishermen or of customs or sanitary surveillance, they are still farther removed from the prototype formed by fortified ports.

If, therefore, it is necessary to discard as false from a historical standpoint the theory of an alleged original occupation, by means of the shore cannon, of the coastal sea or of the rights exercised thereover by the coastal nation, one might, perhaps, relying on certain indications of history, maintain that the limit of cannon range as applied to the neutrality of coastal waters represents a compromise between the opposing interests of the belligerent nation and the neutral coastal nation: the belligerents, being desirous of avoiding the application of more extensive neutrality limits, resign themselves not to pursue the enemy's maritime commerce elsewhere than outside the range of the cannon on the coast. The doctrine on the subject, if thus formulated, would come nearer the historical truth. However, it would no longer afford any information on the genesis of the idea of the territorial sea in general. That armed ships should for special reasons refrain from capturing hostile ships up to within gunshot of the coast does not explain either why foreign fishermen should be prevented from carrying on their industry near the coast, or why merchant vessels should, on approaching the coast, be subjected to the customs and sanitary surveillance of the riparian nation situated on the coast. The reasons which have led to the adoption of cannon range as the limit of neutral waters, not being based on an occupation of the territorial sea or of the rights there exercised, but on respect for the coast properly speaking (which respect is enforced or voluntarily observed), cannot be applied in determining the limits of the territorial waters in other regards than neutrality. If the range of cannon, thus introduced, was afterwards adopted, for instance, in order to define the zone reserved for national fishermen, this was again done by way of analogy.

There remains therefore only one final alternative if the range of cannon is to retain the rôle assigned to it by doctrine, and that is

that the maritime nations should by agreement have attributed to cannon range the general character of a general limit of the territorial sea. But then we should find ourselves in the presence of the choice of an arbitrary measurement; and it would be a question, not of knowing the actual range of cannon, but of determining the sense which was attributed to the cannon range limit at the time when the agreement were reached. In reality, it surely did not enter the thought of the statesmen who had the texts of the eighteenth century prepared, that the cannon range limit was to be extended as technical progress increased the efficiency of cannon fire. But the nations have never agreed to make cannon range the general limit of territorial waters. As a matter of fact a majority of the nations has decided in favor of the three-mile limit. We might, not without reason, say that the three-mile measurement is derived from the cannon range employed in the eighteenth century. But it is then one measure which has superseded the other; and the range of cannon, the prototype of the three-mile limit, is after all, save in particular cases,¹ a historical reminiscence.

Let us summarize the results of our researches: The notion of the territorial sea as we know it at present is not the result of an occupation of the sea effected by the force of cannon. Neither is cannon range the conventional limit of the territorial sea of to-day. Finally, it may be said that the expression "cannon range," where still existing in texts, is taken as an equivalent for three miles rather than that the phrase "three miles" is, where used, taken as an equivalent of cannon range.

If the range of weapons (*vis armorum*) should be taken as the gauge of territorial waters, then the flight of an arrow would have been the ideal limit of the territorial sea before the invention of firearms. This was not the case. In fact, the interests which carry men to sea have not changed on account of this invention. Interests and conflicts being the same, it is natural that the rights and duties flowing therefrom should remain substantially alike. Therefore the limits of the territorial sea adopted before the invention of firearms were often much broader than the limits of modern origin. The proof of this is found in the hundred miles of the Italian law, in the limit of the median line of the ancient English and Norwegian law, and in the limit of vision. Must we speak of occupation of the sea? I see no objection to it provided we observe the difference existing between the occupation of terrestrial things and that of rights at sea. But this occupation is accomplished by ships, and the radius of action of fleets does not depend solely on the weapons employed; it depends

¹ For instance, an Italian decree of April 21, 1895, provides that merchantmen must, within 12 hours after receiving notice, withdraw from the range of the cannon of a fortified place when the latter is to be put on a war footing.

rather on the mariners and their science of navigation, and on the ships and the motive power with which they are provided.

The most important thing is not, in my opinion, to know when and how the occupation or usurpation of this or that right to the coastal sea has taken place. The important thing is to know when and how the express or tacit consent of the nations took place which gives to the occupation or usurpation the character of a lawful title. It is well known that the coastal nations arrogated to themselves in the past, up to a certain extent of the coastal sea, the right to forbid maritime captures, to levy imposts upon navigation, to inflict customs and sanitary inspections upon navigators, and to reserve fishing rights to their own citizens. But to what extent, and for what reasons, did the other nations acquiesce in these pretensions? The answer varies according to the rights involved. The neutrality of the waters along unfortified coasts has been, according to the interests at stake, either contested or else defended and maintained with pertinacity. The result has been a compromise. The right to levy imposts upon navigation outside of ports has entirely disappeared. As far as customs and sanitary inspections are concerned, the reasons which have caused coastal nations to preserve the right to make them were very well explained by a speaker in the House of Lords in 1739: "We must take care not to deny this liberty to other nations; for if we do so, all the nations of Europe will say to us: With the measure that you use will you in turn be measured; as you do not wish to permit us to inspect your ships on our coasts, we will not permit you to inspect our ships on your coasts."¹ Here is a question decided by the force of the reciprocity of nations. In the fishery question many considerations mingle with this feeling of reciprocity and often warp its expression.

For a long time the range of cannon, advocated by doctrinarians and kept by way of reminiscence in neutrality regulations, has been invoked by Governments desirous of extending the limit of the territorial sea for the benefit of their country, or eager to justify their claims to a more extensive territorial zone than usual.² Cannon range thus plays, in our days, a rôle diametrically opposite to that which it was called upon to play in the eighteenth century. Then it was the

¹ Hansard, X, col. 1233.

² The actual range of cannons was invoked as the logical limit of the territorial sea by the Russian Government in its exchanges of diplomatic views with Great Britain in regard to the limits of the fishery zone in the Arctic Ocean and of the customs zone in Russian waters (1910-11), by the Italian ministers of marine and of foreign affairs in the parliamentary debates preceding the passage of the law of June 16, 1912, conferring upon the Italian authorities the power to prohibit merchant vessels, for reasons based on the national defense, from sojourning within a distance of ten miles from the Italian coast (September 30, 1909), and, finally, by a Norwegian commission charged with the duty of passing upon the limit of the fishery zone off Finmarken (report of 1912).

less broad measure used instead of more extensive measures, such as vision, four leagues, etc. Nowadays it serves as a justification for limits which are more extensive than the three miles usually accepted. While it was itself in the eighteenth century a fixed measure, it is now the philosophical formula employed to support limits calculated in miles or other nautical terms. It derives a peculiar force from the fact that the three-mile limit, of which it is henceforth the adversary, has long been regarded as the equivalent of cannon range. The actual range of a cannon is therefore in some measure placed in opposition to the three-mile limit, like the reality, tardily perceived, placed over against arbitrary and blameworthy fiction.

There is no occasion here for passing judgment on the value of the causes which are thus served by invoking the actual range of a cannon. But it is just as wrong, from the standpoint of present jurisprudence, to refer to the actual range of a cannon as it is to suppose that the three-mile limit rests at the present time on the basis of the cannon range. The claim of certain nations to territorial limits exceeding the three miles is, I will admit, supported by valid reasons drawn from other articles of the present law of nations; on the other hand the predominance, in certain connections, of the three-mile limit is explained by reasons which have nothing to do with cannon range. Regarding the matter from the standpoint of realities, we shall first see to what extent the three-mile limit may aspire to the right to constitute an article of the law of nations, even among those nations which have not openly indorsed it. We will then examine whether there remains room for maintaining the more extensive rules adopted by certain powers or for introducing new limits which exceed the three miles of present jurisprudence.

XII. THE PRESENT PROBLEMS.

If the maritime territory of a nation were a territory such as are the parts of the earth subject to the sovereignty of the nation, the problem of its extent in space would be solved by determining the extent of the occupation effected, this being a historical question which would not give rise to the establishment of general rules applicable to the territorial sea of several nations. For that matter, it was from the hypothesis of an original occupation that Selden and his disciples started. But they sought in vain to transplant thus the question into the domain of history. Apart from bays, fjords, portions of the sea inclosed by a chain of islands or islets situated off the coasts of certain countries (for instance, Norway, the western part of North America, and Japan), the occupation of the land does not involve the occupation of the neighboring sea. As to bays, including the mouths of large rivers, and as to fjords as well as the

parts of the sea enclosed by islands and islets (*skaergaarden*), it is a question of history to what extent they have been occupied by the riparian nation; for it is here truly a question of parcels of the sea constituting an integral part of the body of the nation.

The territorial sea is not an occupied territory. If the coastal nation is sovereign there in some measure, it is because it enjoys a number of rights there which are now firmly established and which are designated by the general term of sovereignty of the riparian nation. It is particularly with regard to foreigners who are within the maritime territory that this sovereignty takes effect. It may, to be sure, also be exercised against the citizens of the nation; but the sovereignty of the nation is exercised against these latter wherever they are—on the sea, on the high sea, and even, in part, within the maritime territory of another nation, by virtue of the more or less absolute extritoriality of merchantmen and men-of-war. The reason why the laws of the nation often bind the citizens thereof only within the limits of the territorial sea is owing to specific considerations, most frequently because the Government does not want to have its citizens placed in an unfavorable status in comparison with foreigners enjoying their full freedom of action on the high sea. But in case of doubt the presumption is in favor of the sovereignty of the nation being exercised with respect to its citizens even on the high sea, outside the territorial sea.

It is therefore upon foreigners that will devolve chiefly the observance of the rights enjoyed by the coastal nation and its citizens within the limits of the territorial sea. On this head, the notion of the territorial sea belongs to international law. It falls under the governance of the general principles of the law of nations. It consequently behooves those who are dealing with the question of the extent of the territorial sea to determine the degree to which international law, fundamentally one and the same, may admit particular and diverging rules.

In reality, the unity of international law is not perfect. There are impairments thereof which are sanctioned by treaties or by tacit agreements: The same rules are not everywhere followed; and, within the same territory different principles are often applied to different nations. Without any previous consent the needs of existence and the necessities of life may force a nation to take either general measures which are more annoying than were the rules of international law previously existing, or particular measures which place a nation or the citizens of a nation in a more unfavorable situation than that in which they were before. Such measures are particularly adopted while the nation adopting them is at war; but they may be taken whenever the nation finds it necessary to do so in order to safeguard its existence or its vital interests. From the standpoint

of international law, such measures are at least to a certain degree permissible and may be maintained as long as the necessity itself lasts. Under the present conditions of international law the nation is most often itself authorized, and alone authorized, to judge whether the necessity exists. The only remedy that remains for the nations which find themselves injured by the measures taken is, in the last resort and after exhausting diplomatic means, war. International law having attributed to nations a jurisdiction of some amplitude, it may furthermore happen that a nation will exercise it only against certain nations, or exercise it more or less completely against the different nations. The nations which deem themselves injured by this discriminating treatment may complain of it as an unfriendly act; but, unless treaties or other agreements exist, they can not maintain that this mode of action constitutes an infraction of international law.

Still more, if international law or the treaties concluded by a nation absolutely forbid an act and if a nation commits it under pressure of the necessity of which I have just spoken, in order to save its existence or to safeguard its vital interests, the act must, under conditions hitherto ill defined, be considered as permissible. But if this act causes any injury to another nation, the nation which commits it is obliged to allow damages to the other nation. The immediate effects of the act, such as the transfer of property rights, confiscation, etc., should not moreover be declared valid any longer than the necessity continues, and a restitution in full should take place as soon as the necessity terminates.

Since prescription, as introduced in national legislations, does not exist in international law except in cases provided for by treaties, a condition of things which has existed for a long time is not sanctioned by the law of nations unless the prolonged existence of this state of affairs proves the tacit consent of the nations; here the consent of the nations most interested by reason of proximity or otherwise likewise obliges the nations which are less interested or whose interests have arisen at a subsequent period to permanently sanction this condition of things. Otherwise a state of affairs, even if it had existed since the beginning of the world, would never be inviolable, to the manifest detriment of the interests of all the nations. If, furthermore, a nation is the first to make use of a right which is subsequently recognized as belonging to it by the nations, and if another nation undertakes to exercise the same right to a broader extent, then the first nation will have a right to protest to the other or to refuse to recognize the broader jurisdiction which it claims; were this not so, a continual increase of presumption would jeopardize all progress achieved in the field of international law, and, being a superaddition, the jurisdiction claimed by the second nation constitutes an innovation beyond the pale of in-

ternational law. But, by virtue of this same international law, the first nation is obliged to tolerate, on th part of the other nation, the exercise of the same jurisdiction that it arrogates to itself; otherwise it would itself furnish the proof that this jurisdiction does not come within the precinct of international law. Now, can a nation which makes use of a certain jurisdiction to a given degree oppose the action of another nation which continues to exercise that jurisdiction to a larger extent after the first nation has reduced the measure of its own exercise of the jurisdiction concerned? Obviously not, if the more extensive jurisdiction of the second nation has once received the sanction of international law. The exercise of this more extensive jurisdiction does not become an innovation beyond the scope of international law by reason of the fact that another nation diminishes the extent of the jurisdiction exercised by it. Does it become an innovation from the fact that two or three nations, or even a majoriy of the nations, side in favor of the more restricted exercise of the jurisdiction in question? It will never become an innovation; it will perhaps become an anomaly. If a particular rule has once been recognized by international law, this recognition will not be revoked by virtue of the mere fact that a majority of the nations has subsequently pronounced in favor of another rule. This would be presuming in advance the existence of a state of things which could only arise on condition of an organized representation of the nations, endowed with full powers for undertaking a revision of the rules of international law. A single exception would have to be made in behalf of the provisions of international law having a purpose whose very character imperatively demands uniform action on the part of all the nations. Then it would be understood as a matter of course that the nations which were in the minority would have to aid the triumph of law over anarchy by siding willy nilly with the majority. Let us now apply these general remarks to the rules governing the territorial sea.

The limit which tends to be exclusively recognized by the law of nations is the 3-mile limit. It is the one adopted by the majority of maritime powers in matters of neutrality and fishing, and, in general, with respect to jurisdiction. Customs and sanitary surveillance is, as we have seen, governed by exceptional rules. Although the 3-mile limit may be called the general limit of the territorial sea, we are obliged, upon examining closely the grounds entitling it to universal adoption, to treat separately the various jurisdictions of the nation at sea.¹

¹ The respectively independent existence of the rights which constitute maritime sovereignty was recognized even in the seventeenth century in England, as shown from the following declaration of Sir Leoline Jenkins: "... one ensign or badge of sovereignty doth not necessarily infer another, so as it may be concluded, that because the one is made out by a full proof, and a legal prescription, the other is so too . . . he that warrants the striking, warrants no more to the Lord, than that single drott, the Lord being put to his proof for the fishery (for instance)." (*The Life of Sir Leoline Jenkins*, II, p. 699.)

As to neutrality in time of war, it is by its very nature based on the common accord of the neutral Powers. From the standpoint of international law, neutrality serves to determine to what point the state of war, also recognized by the law of nations, has superseded the state of peace. From the political point of view, all non-belligerent nations are obliged, in order to limit the extent of the war, to observe a strict neutrality. This neutrality consists, firstly, in the fact that the neutral nation must treat both belligerent parties exactly alike, in accordance with the rules of the law of nations; but it involves, in addition, the necessity that all the neutral nations should observe the neutrality in the same manner. In other words, neutrality as an article of international law creates certain reciprocal relations among the neutral nations as members of the international commonwealth. Otherwise neutrality would be merely a factor of national policy and legislation. Furthermore, it is not certain that a formal impartiality in the treatment of the two belligerent parties is really neutrality in the true sense of the word. During the course of the war between Louis XIV and the Anglo-Dutch Alliance, the ambassadors of each of the belligerent parties at Copenhagen urged the Danish Government to adopt a different rule for the limitation of the neutral waters, the French ambassador recommending the limit of cannon range, and the English and Dutch ambassadors that of the radius of vision. Under the treaty of December 28, 1691, the Danish Government finally adopted the latter of these limits. It evidently caused it to be observed by both the Dutch and English privateers and the French privateers; but as the latter were the masters at sea and inflicted heavy losses on the maritime commerce of the two allies, the measure of the Danish Government, while apparently impartial, limited a freedom of action by which the French profited more than the others and was therefore in reality detrimental to France. As to the duties of neutrals, it is the consensus of opinion that they should be interpreted in the same way by all the neutral nations, and that it is solely the imperfect state of international law that prevents the views from being absolutely identical everywhere. It should be the same with regard to the extent of neutral waters in time of war. It is, for that matter, infinitely easier to arrive at an understanding on the extent of the neutral waters than on the real nature of the duties of neutrals. It is true that the extent of neutral waters as adopted by the majority of the nations may, in the case in point, offer more advantages to one of the parties than to the other. However, by departing from the rule followed by the majority we should perhaps aggravate this inequality or shift the disadvantage to the other party; in any event, the nation that modified the generally adopted rules ought to be alone responsible for this state of things, and it would, without any valid excuse from the standpoint of law, incur the resent-

ment of the party whose interests were injured. In this case, therefore, the justification disappears which might be found for the former practice. Even if one nation has, with the consent of the others, maintained an extent of neutral waters which is broader or less broad than that usually adopted, it must, in order to conform to the idea of neutrality accepted by the international law of to-day, contribute on its part to the establishment of a uniform rule on the extent of neutral waters. Thus Spain, which formerly observed a limit of neutral waters of two instead of three miles, and which maintains in certain respects a territorial limit of six miles, appears to have hesitated, as regards the neutral waters, between this and the three-mile limit. For the Scandinavian nations, Norway, Denmark, and Sweden, the choice will be difficult, in case of war, between the 3-mile and the 1-mile limit, unless a new international agreement comes about meanwhile to widen the neutral zone. The chances of having such an agreement succeed are singularly improved by the recent French decree, under date of October 18, 1912, fixing the extent of the French neutral waters at six miles from the coast and from the uncovering banks which belong thereto. Not having, as far as I know, aroused any opposition on the part of the great maritime Powers, this decree implies the possibility—I should prefer to say the necessity—on the part of the other maritime Powers of adopting the same limit in the matter of maritime neutrality.

Finally, neutrality under the aspect which is the most essential, nowadays, I mean the prohibition of hostile acts between the warships of the belligerents within the limits of the territorial waters, dates only from the nineteenth century. It is consequently subsequent to the exceptional standards adopted by Spain and the Scandinavian nations. The rule which was adopted originally for this particular case was the 3-mile limit. In connection with this new idea of neutrality, the exceptional standards were not recognized.

As a matter of fact it is necessary to distinguish clearly the consequences of a state of neutrality as regards maritime captures and as regards warlike enterprises proper. The rules governing maritime captures can never involve the vital interests of the belligerents; it is entirely different with the rules relating to warlike enterprises. The neutrality of territorial waters in the matter of maritime captures should be considered as absolute. Any maritime capture that infringes upon this neutrality is a violation of international law as established during the course of the centuries; this is in my opinion true even if the coastal nation has neglected every precaution in order to maintain the neutrality of its territorial waters. The terms of the convention concluded at The Hague in 1907 on naval warfare, to the effect that the coastal nation should maintain with the means at its disposal the neutrality of its territorial waters, ought not to have any

connection with the question of maritime captures. If made in the territorial waters of a neutral nation, these captures are never valid. It is otherwise with warlike enterprises in neutral waters. In this regard, international law tolerates the exception of which I spoke above, namely, that it will not be an infraction of international law if a belligerent nation, under the pressure of necessity and for the sake of its vital interests, gives battle in the territorial sea of a neutral nation which is not in a position to disarm the hostile fleet that has sought refuge there. Then the terms of the convention of 1907 preserve their sense. If the great naval powers have consented to respect, even in regard to warlike enterprises, the neutrality of the territorial waters of a neutral nation, it is on condition that the latter shall do its best to prevent any utilization of its territorial waters for a warlike purpose. If it fails to fulfill this condition, the obligation on the part of the belligerents to respect its territorial sea disappears, save as regards the bays and inland waters which constitute an integral part of the territory of the nation. If the neutral nation wishes but is unable to maintain its neutrality, the belligerents shall not have a right to avail themselves of its waters; but, in case one of the parties should use them illegally, the other party will, under pressure of the necessities of war, have a right to use them also; and, if the fleet of one of the belligerents takes refuge in the neutral waters without being disarmed, the fleet of the adversary will have a right to pursue it and engage it in battle. Territorial waters are therefore not likened to land territory as far as neutrality is concerned.

The opinion has occasionally been expressed that the belligerents are not only obliged to keep at a certain distance, that is, three miles, from the coast, but that they must refrain from firing their cannon in such a way that the projectiles will fall and cause havoc on the neutral land or even on the shipping anchored in the neutral waters. It does not seem that the international law of to-day imposes such an obligation upon belligerents. Any warlike action or any maritime capture is permissible outside the 3-mile limit; however, a belligerent nation whose cannon during a naval engagement cause injury to persons or things situated in the territory of a neutral nation, will be obliged to pay damages, just as it is liable for the havoc created in the neutral territory during a battle fought on land near the frontier of a neutral nation.

The fishery question is different. It is not necessary, either from a political standpoint or from the standpoint of international law, that the zone reserved for national fishermen should be of the same extent in all countries. When the coastwise fishing rights were reserved in Europe to the inhabitants of the respective countries, the great maritime Powers stopped at the 3-mile limit. They are likewise obliged to recognize other countries as having the right to appro-

priate the coastal fishing rights up to the said distance. But when it is a question of an innovation they are not, in my opinion, obliged to respect a wider zone than 3 miles. The peculiar circumstances of a case may be of such a nature that it would be considered an unfriendly act to oppose the establishment of an enlarged zone, but obligation there is none. On the contrary, when a reserved fishery zone more than 3 miles wide existed and was recognized before the adoption by the Powers of the 3-mile limit, then they are really obliged to respect it, for a rule which was originally legal does not become illegal simply because a majority of the Powers adopt another one. Obviously the maintenance of an exceptional zone may, if it is useless to the coastal nation, be considered in turn as an unfriendly act; but the coastal nation is not obliged from an international standpoint to abandon it. The maintenance of a widened zone becomes all the more valid if a native coastal population depends on the products of the fishery, for international law is supposed to respect the units of which the international commonwealth is composed, and even the subdivisions of these units when of any importance; it will not without sufficient reasons compel a nation to sacrifice a part of its population; it will not cause civilization to retrogress by devastating formerly peopled territories for the benefit of foreign fishing enterprises which are more or less uncertain and without vital importance to the persons who would carry them on. If fishing has given rise to the peopling of the coast and it is a certain fact that the population would have difficulty in standing the new competition of the foreign fishermen, this exceptional state of affairs may even take the place of the lacking international sanction, or strengthen it if it is not complete. Moreover, international law admits, it seems, the possibility of an occupation not only of pearl banks such as those of Ceylon, situated from 6 to 21 miles off the coast, but also of fishing grounds; thus, the banks of Newfoundland have long been in the exclusive possession of the English. It is in the light of these various considerations that we must judge the pretensions of Spain and Norway to a zone respectively of 6 miles and 1 *mil* off the coast. I do not know for certain whether the Spanish pretension is anterior to the adoption of the 3-mile limit, which runs back in the matter of fisheries to 1839, the date of the first convention sanctioning this limit in Europe. But in Norway coastwise fishing has been reserved from time immemorial to the population, and the 1-mile limit, dating from the end of the eighteenth century, is but a restriction of ancient pretensions extending considerably farther. In order to settle the difficulties incident to the delimitation of the zone for fisheries and for the exploitation of coastwise sea products in general, it would be well to organize an international inquiry, setting forth the various considerations of law and fact which relate to the question of coastwise fishing in the dif-

ferent countries, and to establish by common consent the limits to be observed on the different coasts. An agreement thus reached would put an end to a period of uncertainty and agitation.

Maritime jurisdiction in civil and criminal matters is, in its present aspect, a creation of the nineteenth century. It will, therefore, save inconsiderable exceptions, be subject to the rule of the 3-mile limit, which is intimately connected with its very introduction into the law of nations. On the other hand, as the jurisdiction of the riparian nation usually offers more advantages than inconveniences to foreign nations and their citizens, its extension beyond 3 miles will perhaps not, in this connection, arouse serious objections. It is in this domain, really the most important, that it will be easiest, when the special questions relating to fisheries and neutrality are gradually settled, to bring about an international agreement concerning the extension of the territorial sea, which extension is advocated by the vast majority of modern jurists. Conformably to the interests which are at stake, the nations will probably consent here to a differentiation, either in accordance with the matters regulated or according to the nationalities of the persons and ships had in view. In these questions of a purely practical character, the reciprocity of treatment granted on each side will often suffice to satisfy the nations, and respect for legitimate interests will permit considerable mutual concessions. In dealing with special matters it will furthermore be possible to frequently take as a basis the peculiar rules connected with customs and sanitary surveillance, which is itself a detached part of maritime jurisdiction.

The rules of customs and sanitary surveillance are very different according to the various countries. Sanitary surveillance is even exercised in certain countries within a narrower zone than 3 miles.¹ Most frequently the zone of customs and sanitary surveillance exceeds the 3-mile limit. By virtue of commercial treaties, different rules are sometimes applicable to different countries. Save contractual stipulations, each country will be justified in extending the zone to the widest limit generally recognized by jurisprudence. The limits employed in these connections will not fail to exert a considerable influence along the line of the progressive increase of the extent of maritime jurisdiction in general. The final limit is not yet reached. Perhaps development will not stop short of the median line—that ancient limit of a more vague and more narrowly selfish jurisdiction.

It is important, finally, to note in this connection that maritime Powers engaged in a war will be warranted in extending their territorial waters for the needs of military supervision. Thus Turkey, in

¹ In Italy the limit of sanitary surveillance is 5 kilometers only.

1911, on the occasion of her war with Italy, declared through a notice to the Powers that a 5-mile zone off the Ottoman coasts, as well as Salonica Bay, should be considered, as regards military operations, as forming part of the territorial waters of Turkey. It is in some respects equivalent to declaring martial law at sea; and, in order to determine the maximum extent of the zone subject to martial law, the zone of customs and sanitary surveillance should rather be taken as a guide than the zone of general jurisdiction. In Italy the law of June 16, 1912, gives the limit in this connection as ten nautical miles. In the absence of contractual stipulations contemplating more especially a state of war,¹ one is even obliged to admit that the nations which control the two shores of an international strait will have a right, in case of hostilities, to supervise peaceful navigation and neutral ships more closely than the rules prevailing with respect to international straits permit in time of peace. If useless vexations are caused neutrals by officers of a belligerent Power, the neutral nation shall of course be entitled to interfere in behalf of its citizens, having recourse if necessary to the international prize court when the latter shall have gone into operation. It would not even be possible to declare in advance, in an absolute way, that any closing of an international strait in case of war were illegal from the standpoint of international law as now constituted. However, in order to be legal or permissible, the closing would have to be called forth by the needs of military operations, by necessity of war; it could not be employed as a means of facilitating or even of suppressing military surveillance. At all events, the Powers which proceeded, under the pressure of the necessities of war, to close an international strait would be bound to indemnify the neutral nations for the inconveniences resulting therefrom, which obligations would naturally make the belligerent Powers reflect if contemplating the adoption of such a measure.²

It is therefore necessary, in my opinion, to contemplate the possibility of a progressive differentiation of the rights which nations exercise at sea. But in consequence of the very complexity of these rights, and at least up to the extent indicated by the right whose radius of exercise is the smallest, the territorial sea will remain the maritime territory in the sense which this term acquired during the course of the nineteenth century. The maritime sovereignty of a nation will in no wise be diminished even by the most complete differentiation of the rights which compose it.

¹ As is the case with the Suez and Panama Canals, declared neutral by international treaties.

² See the declarations of the French Admiral Germinet in *l'Echo de Paris* of September 3, 1912, in regard to the possible closing, in case of war, of the Straits of Dover by the riparian powers, France and England, and the discussion aroused by these declarations. The reply of Mr. den Beer Poortugael in *Het Vaderland*, under date of September 16, 1912, does not seem to take sufficiently into account the exigencies of a state of war at sea.

RALSTON: *International Arbitral Law and Procedure.* Boston, 1910.

Page 207.—433. National sovereignty over territorial waters, as is well understood, “is determined by the range of cannon measured from the low-water mark,” as was said by Mr. de Martens, arbitrator, in the *Costa Rica Packet* case (Moore, 4952), he adding “that on the high seas even merchant vessels constitute detached portions of the territory of the state whose flag they bear, and, consequently, are only justiciable by their respective national authorities for acts committed on the high seas.”

434. In the case of the schooner *Washington* (Report of British-American Claims Commission of 1853, 170, 172), Upham, American Commissioner, said, referring to the jurisdiction of Great Britain over the Bay of Fundy:

The law of nations does not, as I believe, give exclusive jurisdiction over any such large arms of the ocean. Rights over the ocean were originally common to all nations, and they can be relinquished only by common consent. For certain purposes of protection and proper supervision and collection of revenue, the dominion of the land has been extended over small inclosed arms of the ocean, and portions of the open sea, immediately contiguous to the shores. But beyond this, unless it has been expressly relinquished by treaty or other manifest assent, the original right of nations still exists of free navigation of the ocean, and a free right of each nation to avail itself of its common stores of wealth or subsistence (Grotius, book ii, chap. ii, sec. 3; Vattel, book i, chap. xx, secs. 282, 283).

Mr. Hornby, the British commissioner, did not agree with this general view, but on reference to the umpire, Mr. Bates (Moore, 4344), the latter said:

The Bay of Fundy is from sixty-five to seventy-five miles wide and one hundred and thirty to one hundred and forty miles long. It has several bays on its coasts. Thus the word bay, as applied to this great body of water, has the same meaning as that applied to the Bay of Biscay, the Bay of Bengal, over which no nation can have the right to assume the sovereignty. . . . The conclusion is, therefore, in my mind irresistible that the Bay of Fundy is not a British bay, nor a bay within the meaning of the word as used in the treaties of 1783 and 1818.

435. The question of the right of a nation to pursue merchant vessels suspected of committing a municipal offense beyond the limits of its territorial sea, was considered by Mr. Asser in the case of the *C. H. White*, coming before him as arbitrator (Whaling Claims:

against Russia, Foreign Relations of 1902, Appendix I, 462), he saying:

That the seizure of the schooner took place, according to the party claimant, at about twenty, and according to the defendant party at about eleven or twelve, miles from Russian Territory, and that even if the latter version be the true one, it results that the act was perpetrated outside the Russian territorial waters, which is moreover admitted by both parties; . . . that the system of the defendant party, according to which a war ship of a state would be permitted to pursue even beyond the territorial sea any vessel whose crew was guilty of an illegal act in territorial waters or on territory of that state, could not be recognized as conforming to the principles of international law, since the jurisdiction of a state does not extend beyond the limits of the territorial sea, unless that rule has been derogated by a special convention.

He did not therefore think it necessary to examine as to whether the claimants had been guilty of illegal sealing in Russian territorial waters.

Page 308.—672. We have seen under the head of "Government" the extent to which a nation may claim dominion over the waters of the ocean. We have found in discussing the question of sovereignty that the war ships of a state would not be permitted to pursue beyond the territorial sea any vessel whose crew was guilty of an illegal act in territorial waters or on the territory of that state, except it be by stipulated convention (*C. H. White case, Whaling Claims Arbitration, Foreign Relations of 1902, Appendix I, 462*).

The majority of the Fur Seal Arbitral Tribunal decided that under the treaty of 1825 between Great Britain and Russia the Bering Sea was included in the phrase "Pacific Ocean" as therein used; that all rights of Russia as to seal fisheries in the Bering Sea passed to the United States, but that the United States had no right of protection of or property in fur seals frequenting their islands in the Bering Sea where the seals were found outside the ordinary 3-mile limit.

RIVIER: *Principes du Droit des Gens.* Paris, 1896.

Volume I, page 145.—The Littoral Sea.—The territory embraces also that part of the sea or ocean which is nearest the shore of a State, either mainland or island. It is called the littoral or territorial sea (the word "territorial" being taken in a specialized sense,) as well as adjacent sea (*mare proximum*).

The term "territorial sea" is applied to all seas or portions of the sea which belong to the territory—to the littoral sea, the interior sea, in the various acceptations of this word, to gulfs, to straits. It is the general legal term, while the others are rather physical or geographical. The term "littoral sea" has the advantage of being special. It is also called "jurisdictional sea," according to one of the elements of its legal position.

The principle that the littoral sea is a part of the territory is justified by the requirement of the preservation of the State from a military, sanitary, and fiscal point of view, as well as from that of the interests of industry, particularly fishing. The result is that for the coast and land the littoral sea has the character of an accessory, which can not be acquired independently of the coast.

The principle itself is incontestable, but its extent and application give rise to divers questions.

While a part of the territory, the littoral sea is also a part of the sea. It follows, therefore, that it can not be under the control merely of the interior laws of the State, but it is also governed by maritime law.

What is the extent of the littoral sea? It appears rational, in view of its purpose and accessory nature, to say that it extends so far from the coast as the territorial power can be defended and maintained; that is, to the range of a cannon shot. This ought to be calculated from high-water mark. It is necessary to erect on the land permanent establishments for the purpose of dominating the sea and coast batteries protected from the tide. It matters little whether these batteries are erected or not. It suffices that they can be. We take account of normal tides, not exceptional ones, such as a tidal wave. This is the rule of the common law, although some derogations on various points are admitted.

Some recent conventional legislative or judicial acts have replaced the range of cannon, variable on account of the progress in the art of ballistics, by fixing a distance of a marine league—that is, 3 marine miles, or one-twentieth of a degree of latitude. This distance, calculated from low-water mark, corresponds to what recently was the cannon range. It is perceptibly less now and consequently insufficient.

Certain States maintain a fixed but greater distance. Norway, for whom the question is of prime importance, by reason of its fishing, establishes it at one-fifteenth of a degree; Spain extends it to 6 leagues [miles].

Divers States claim a customs territory of much wider extent by reason of their right of self-preservation and to prevent frauds. For the English and Americans it is 4 marine leagues—that is, 12 marine miles. It is undoubtedly correct that by virtue of the liberty of the

sea, and not merely to assure the customs service, but also for the sanitary police and for other objects, that national establishments may be placed beyond the limits of the territorial sea, properly so called. Conventions have been concluded to this effect. . . .

The range of cannon ought to be the distance actually fixed for all countries by the state of the science and industry and not that which the artillery of a country may reach. The rational principle of the range of cannon is formulated by Bynkershoek in chapter 2 of his dissertation *De dominio maris*.

The distance of 3 miles has been admitted by the Russian Prize Rules of 1869, by the British Territorial Waters Jurisdiction Act of 1878, by the Hague convention of 1882, and by the convention relative to the Suez Canal of 1889. The Bering Sea tribunal also considered it as the normal distance in 1893. . . .

The littoral sea being a part of the territory, a State generally exercises within it all the rights flowing from sovereignty.

Thus, the exclusive right of coastal navigation, the exclusive right of taking the fruits of the sea, fishing, taking oysters, pearls, corals, sponges, etc.; the administration of justice and the exclusive right of legislation; the administration of customs and general police; the regulation of pilotage, signals, shipwrecks, and salvage; the right of inquiry aboard ship at anchor in the littoral sea; and to decide upon the admission into its ports and roadsteads of foreign ships of war. . . .

The sovereignty of the State over the littoral sea, in spite of certain limitations which result from the nature of the sea, is an actual sovereignty not differing in its nature from that which belongs to the State over other elements of the territory. The State over the littoral sea has not *a* but *the* right of sovereignty. . . .

The most well-known and important derogations from the exclusive right of fishing in the littoral sea are the servitude constituted in favor of France by Article 13 of the treaty of Utrecht, of 1713, ceding Newfoundland to Great Britain, and the servitude in favor of the United States in the British waters of Newfoundland and Canada. . . .

Page 153.—Every sea which is a part of the ocean is a part of the free sea. It is otherwise when it is surrounded by the territory of a single State, which can control its entrance or dominate the straits by means of batteries, thus having an effective power to close it at will. In such a case the sea belongs to that State. It is a closed sea, *mare clausum*. If there are several coastal States, the liberty of the sea prevails; the sea does not belong to the bordering States *pro rata regionis*, it is free.

The sovereignty of a State over the closed sea is not limited like that over the littoral sea. It does not legally differ from sover-

eighty over an interior sea, in the strict sense, and over a lake. "A sea or a gulf communicating with the ocean by one or more straits can not be recognized as an appropriated sea, except in cases in which its coasts belong to a State which is master of the straits giving access to it, provided that this passage be narrow enough to be controlled by cannon placed on the two shores."¹

"This denomination [of closed seas] cannot be applied except to portions of the sea projecting far into the land and communicating with the sea by a strait narrow enough to be commanded by force from the two shores. It is necessary, moreover, in order that the sea be actually closed that all its shores on the two sides of its entrance be subject to the same sovereignty. When these two conditions are united such a sea, whatever its extent, is considered territorial. It is the exclusive property of the State which governs its shores, but from the moment that the shore belongs to several sovereigns, none of them, not even the proprietor of the two shores of the straits, has the power of closing its passage."² . . .

In conformity with what we have just said, portions of the sea or seas which are, by reason of their configuration, called gulfs or bays, are territory when they are surrounded by the land of a single State or when their entrance is sufficiently narrow to be commanded by cannon from its shores; but as soon as there are several bordering States, the gulf is a free sea, whatever the width of its entrance. A gulf, even though surrounded by a single State, is a free sea if its entrance is too wide to be dominated from the shore. It is generally admitted that this is the case where the distance between the shores is more than 10 marine miles.

Territorial gulfs are governed by the same legal principles which apply to other interior seas. The littoral sea commences where the territorial gulf ends.

The word "gulf" is here employed in the wide sense, comprising bays, roadsteads, etc. A gulf is a part of the sea which penetrates the land and whose opening toward the sea is fairly wide, giving it the appearance on the map of the breast of a woman, whence its name. A bay, according to Littré, is simply a gulf whose entrance is narrow. There are, however, wide bays. A roadstead is "a stretch of sea inclosed by more or less elevated land which presents to vessels an anchorage secure from winds and waves from a certain direction."

The Frische Haff and the Kurische Haff are German, as well as the Gulf of Stettin and the Bay of Jade. The Gulf of Riga is Russian. Great Britain has declared territorial the Bay of Conception, Newfoundland, and the Bay of Fundy, whose entrance is 15 miles wide.

¹ Perels, p. 85.

² Hautefeuille, *Histoire*, p. 21.

The Gulf of Bothnia is a free sea, as well as the Gulf of Finland, although Russia calls it Russian. The Delaware and Hudson bays are free, in spite of the contrary English and American opinion.

Roadsteads, ports, and harbors are not in the status of the littoral sea. They belong to the State absolutely and entirely, in the same way as every other part of the territory.

SCHMALZ: Le Droit des Gens Européen. Paris, 1823.

[Translated from German into French by de Bohm.]

Page 143.—It is evident that the right of property is not admissible with respect to the ocean. Cultivation could secure no property whatever for the individual, nor could the combination of several rights of property form for the State a maritime domain as one may form a continental territory by uniting portions of land. It is, therefore, only by means of treaties that nations may establish in the ocean an analagous right, a domain, or sphere for the exercise of sovereignty. Nevertheless, this order of things can only be obligatory for the contracting parties and could not extend to other peoples and exclude them from it, as the cultivation of the soil excludes all other acquisition. We do not consider it superfluous to recall here that, according to the law of nations, the term “property” is used to designate the right of a nation over its territory; but we can not attach to this expression any other sense than that of sovereignty, and that the latter appears in the law of nations under the character of property, although in the internal law of a State it may have a different sense. From this point of view, then, the exercise of sovereignty may equally apply to the maritime domain and limit its use for foreigners in like manner as this restriction is applied to the land territory. But there are parts of the sea over which the domination of the State is recognized by all nations, even when they are not enclosed within the land, so that this supremacy would appear as a natural consequence. St. Georges Channel, between Great Britain and Ireland, belongs to the British Empire. The Hellespont and Bosphorus, the Sea of Marmora, the Aegean, and the Black Sea are a part of the Ottoman Empire. The Straits of Messina are a dependency of the Kingdom of the Two Sicilies; the Zuyder Zee belongs to the Netherlands, as the Sound itself and the two Belts belong to Denmark. Moreover, the parts of the sea which wash the coasts have always been regarded as the property of the country adjacent to them. It is only outside of Europe, in which the restless jealousy of the powers seek to maintain an exclusive commerce with their colonies, that the navigation of foreign nations to a considerable distance from these shores has often

been forbidden. In Europe the opinion of the jurists who treated this matter philosophically appears first to have been adopted as a system. According to this principle the sea ought to belong to the nation as far as the defense of the coasts may extend, taking as the standard of measurement the range of cannon shot; but since then it has been fixed quite arbitrarily at 3 marine leagues. Great Britain is the only power which has extended its claim farther in this regard, seeking to forbid herring fishing in the North Sea to the Dutch as far as a distance of 30 English miles; as in Iceland Denmark asserted the right to keep off foreign vessels within 4 German miles.

On the other hand, the powers recognized as free several portions of the sea over which it would seem to be easy to raise claims, as the Straits of Gibraltar, the White Sea, and the Spanish Sea. But serious debates have taken place on other points and perhaps they will arise again. Denmark, it is true, no longer claims sovereignty over the Baltic because it possesses the key; Austria, for Venice, does not claim domination of the Adriatic Sea, nor Sardinia for Genoa, over the Ligurian Sea. But it has not yet been decided to whom the Gulf of Finland belongs, which Sweden, up to the cession of that Province, possessed uncontested. The sovereignty of Great Britain over the seas which surround it has often been debated; more often in schools than between powers. The British Government itself does not believe it is authorized to extend this sovereignty to the opposite coasts, a right which some publicists sought to ascribe to it. These claims, however, have only been asserted with respect to the British Channel and the Pas-de-Calais. . . .

Page 188.—We have already observed that the right of sovereignty which different States possess over certain portions of the sea, principally over those which border the coasts, is recognized. We must now examine the relations which result therefrom among the nations.

Every State in the parts of the sea subject to its domination exercises all the rights attached to sovereignty, consequently crimes and misdemeanors committed there are within its jurisdiction. A pirate may be pursued in the open sea by the subjects of any power, but near the coasts he is subject to the authority of the sovereign to whom they belong. . . . The sovereign is likewise authorized to assert rights within the extent of this district, because he maintains peace and security within it by his police. By the same right, with the exception of free navigation, the State may forbid subjects of foreign powers the free use of the sea up to a certain distance, and by much greater reason prevent them from appropriating objects lying along the coasts, either those that consist in marine products, like amber, or wrecks or cargo jettisoned at sea to lighten the vessel.

A State has the incontestable right of reserving to its subjects the right of fishing along the shore, but in the open sea beyond the limits

recognized, it can not forbid fishing to foreign vessels, although they may oppose the drying of fish on the coast. This is why powers have frequently extended the exercise of their rights of sovereignty beyond the distance of 3 marine leagues, which custom sanctions. Denmark, among others, has claimed 15 German miles for Greenland and 4 for Iceland.

Navigation in parts of the sea subject to a power, entrance into its harbors, permission to enter its roadsteads, are reciprocally granted by the European States under the condition of not contravening the local laws, but principally of not bringing in prohibited merchandise. It is only outside of Europe that closed ports exist, the entrance to which is not permitted to foreigners except in case of distress.

SCHÜCKING: *Das Küstenmeer im Internationalen Rechte.* Göttingen, 1897.

Page 6.—The doctrine of the territorial extension of the sovereignty of adjacent States over the coastal sea in its historical development up to the resolutions of the Institute of International Law.—Studying the historical development of the doctrine of the coastal sea we find that Bartolus de Sassoferrato, the most prominent of the postglossators, first expressed the idea of sovereignty of the adjacent State over the coastal sea in his "*Tractatus: Tyberidis*."¹

We read that once, when he was spending his vacation in a country home near Perugia, a spirit appeared to him and asked him in the name of the God of the Tiber to write an essay on this subject. And in this essay Bartolus held that every adjacent State should have an "imperium" over the coastal sea to the extent of 100 miles, or a two days' journey. His brother Angelus was willing to concede to the State an "imperium" beyond that limit if they would not get into conflict among themselves with regard to the extent of their "imperium," and this same view is taken by the postglossators of the fifteenth century, such as Fulgosius, Castro, Caepolla, and Felinus.²

But, in fact, the doctrine of Bartolus has been leading the Italian State system, especially since even Zaldus de Ubaldis agrees with Bartolus. Thus, we know of a decision of the Supreme Court of Piedmont of the second half of the seventeenth century which upon these authorities allowed a Spanish ship sailing for Naples to be

¹ Bartolus, *Operae*, vol. vi, Lugdunum, 1552, p. 146.

² Tellegen, *Disputatio de iure in mare, imprimis in proximum*, Groningen, 1857, p. 13.

stopped by a Savoyan man-of-war at a distance of 50 miles from the port of Monaco "*ab non solatam gabellam*."¹

Considering the great influence of the Italian jurisprudence in the whole civilized world of that time, we do not wonder at finding other nations taking this stand. Thus Bodinus² explicitly refers to the decision of the Court of Piedmont and to the doctrine of Bartolus, but he fixes the limit at 60 miles. Also, in Germany Bartolus' teaching began to spread. While in 1594 the Baltic Sea was considered as belonging to the Duke of Pomerania only to the extent of half a mile from the shore,³ as early as 1652 a certain Stypmann⁴ gives a 100 mile limit as the one commonly accepted, but, influenced by Bodinus, he adds, "others extend this limit to 60 miles, as has been decreed in the case of the Duke of the Allobroges." At the beginning of the following century only Oetinger follows Bartolus,⁵ while Loccenius⁶ follows Bodinus, and Vattel also only cites Bodinus' doctrine in order to oppose it, taking the view of Bynkershoek.⁷

However, the authors following Bartolus's doctrine continue to place the limit of the coastal sea nearer to the coast, which is to be considered as a concession to the opinion of Grotius and of Bynkershoek, who depends on Grotius, which as early as the middle of the last century was the prevalent view on this question.

Hugo Grotius justly deserves the name of the father of international law, and the doctrine of the coastal sea in its present form can be traced back to him. An ardent defender of the principle of the freedom of the sea, he yields to the necessities of the nations and admits the possibility of the sovereignty of a State over the adjacent sea.⁸ But in the same chapter he says:

But certainly he who has occupied the sea can not hinder peaceful and innocent navigation.

In two respects this theory differs from that of Bartolus and his school. First, he repudiates a limit of a certain number of miles and recognizes this sovereignty only so far as it actually can be exercised from the coast; secondly, he claims the absolute freedom

¹ Cacheranus, *Decisiones Senatus Podemontani*, Dec., 155.

² *De republica*, Paris, 1586, l. 1, chap. x, p. 107.

³ See Raumer, *Die Insel Wollin*, Berlin, 1851, sec. 144.

⁴ *De iure maritimo*, Gryphrw., 1562, sec. 56.

⁵ Oetinger, *Tractatus de iure et controversiis limitum*, Hanover, 1715, bk. 1, chap. xii, note 7.

⁶ *De iure marit.* in *Heineccii scriptores rei marit.*, 1740, sec. 921.

⁷ Vattel, *Le droit des gens*, Leide, 1758, I, chap. 23, sec. 289.

⁸ *De iure pacis et belli*, l. ii, chap. iii, sec. 13. "But it may easily enough happen that the sovereignty over only a part of the sea may be claimed without any other rights of property, and I do not think the international law I spoke of will stand in the way. But it seems the sovereignty over other possessions is acquired, i. e., as I said before, with the right of persons and with the right of territory. With the right of persons, if a fleet which is simply a maritime army is somewhere on the sea, and *with the right of territory*, in so far as control is exercised from the land over those who are on the coastal sea, with the same effect as if they were on the land itself."

of peaceful navigation on the coastal sea. Accepting the view of Cornelius van Bynkershoek¹ for the extension of sovereignty over the coastal sea, the possibility of an actual exercise of sovereignty (control) is a condition, beside the *animus* the *corpus* also being essential to possession.

Because, above all, it seems right that the sovereignty be extended *as far as missiles explode, for thus far we seem to command as well as to possess*. But I speak only of those times when these machines are used, and, generally speaking, the power of the land terminates where the *vis armorum* terminates. He bases his opinion upon the fact that it is actually exercised, as, at least, the States General by a resolution of January 3, 1671, had instructed their captains to salute as required by the Sovereign on the coast of a foreign State, as far as the guns of the cities or the forts reach. To answer the salute was left to the sovereign, everybody being master within his own possessions, and everyone arriving being subject to him. In 1688 Molloy ordered that the English ship should do the same within a cannon's range from the foreign coast.²

Since the necessity of protection of the coast against a hostile attack is one of the most urgent reasons for the extension of the sovereignty of the adjacent States, we must agree with Bynkershoek that the sovereignty of the State shall extend as far as an effective control can be exercised. It seems, therefore, natural that the theory of Bynkershoek replaced the doctrine of Bartolus, and that it should enter into the practice of the States as well as into the books of scholars of the past century.³ Probably the cause of the victory of Bynkershoek's theory was not only its logic, but also the fact that it did not restrict the principle of the freedom of the sea, which had become more and more recognized to the same extent as had Bartolus's hundred-mile limit.

Yet it can not be denied that the limit proposed by Bynkershoek has one decided advantage, namely, its uncertainty. The range of the best guns may remain the same for several years, yet it may change several times within one year. The practice of States even at that time and still more to-day requires a fixed limit for the administration of maritime functions which will remain the same for a considerable length of time. Such considerations in many cases caused the nations to restrict the extent of their sovereignty over the coastal sea again to a certain mile standard either by conventions or by single acts of legislation. As a basis for the mile standard of measurement a cannon-shot range was considered, which, according to the status

¹ *De dominio maris*, 1703, chap. II.

² Cf. *Annuaire de l'Institut de droit international*, vol. 12, p. 108.

³ Surland, *Grundsätze des Europäischen seerechts*, Hanover, 1750, sec. 88; Moser, *Grundsätze des Europ. Völkerrechts*, bk. IV, chap. I, sec. 3.

of the artillery technic at the end of the last century, was taken as 3 marine miles, or 1,852 meters each, 3 of these marine miles making 1 French *lieue marine* of 5,556 kilometers and 60 marine leagues making 1° of latitude. The so-called 3-mile limit appears first in the practice of the States in a note of Jefferson to the English minister of November 8, 1793. Since that time it is found in a great number of laws, regulations, international treaties, declarations of neutrality, etc., to cite all of which would take too much space. It may be mentioned, though, that it also is contained in Article 2 of the Convention at The Hague of May 6, 1882, between the German Empire, Belgium, Denmark, France, Great Britain, the Netherlands, and Sweden concerning the regulation of the fisheries of the North Sea, and that the German Government on several occasions has pronounced itself in favor of this theory, especially in its motives for the laws governing the inquiry into accidents at sea.¹

From this fact many writers have inferred that through the international usage of almost a hundred years the former cannon-shot range had been replaced by the 3-mile limit. At the Chicago exposition Krupp displayed a 24-cm. coast cannon with a range of 20,226 kilometers at an altitude of 44°, as tested at the practice range at Meppen in April, 1892. At that time the cannon range was nearly 11 sea miles, and this clearly contradicts those writers who identify cannon-shot range within the 3-mile limit. There are others that claim that the cannon-shot range has been replaced in international law by the 3-mile limit. But if we remember that it was chiefly the need of protection for the coast that caused the extension of the sovereignty of the adjacent State, then we shall not, without a most careful examination, agree with those who make protection almost impossible by adopting the 3-mile limit. For if two men-of-war in action would respect only a coastal sea restricted by the 3-mile limit, their missiles would fall on land at a distance of about 15 kilometers and would cause the most terrible destruction. Thus, the 3-mile limit certainly does not serve the interest of the nations. Therefore, Mr. Seward, Secretary of State of the United States, communicated with the British chargé d'affaires at Washington on October 16, 1864, with a view to extend by international agreement the limit of the coastal sea from 3 to 5 miles on account of the change of the cannon-shot range. But is there any need of an agreement to abandon the 3-mile limit? We think not, because of the 3-mile limit having never wholly replaced the cannon-shot range, nor of it ever being generally accepted. At the occasion of an international regulation of the Sound fisheries in 1874, Spain, the United States, Germany, Austria, Italy, Denmark, Holland, and Belgium declared if ever the limit of the

¹ *Verh. des Deutschen Reichtags*, 1877, vol. iii, Drucksachen, p. 4; compare also the same, 1875/76, vol. iii., pp. 480-504.

coastal sea should be determined by an international agreement, 3 sea leagues should be the minimum. To-day Spain claims a distance of 6 sea miles as her coastal sea, Norway at least 4, and England and the United States extend their control of customs to 12 sea miles; thus England expects all ships coming from places where contagious diseases rage and meeting other ships within a distance of 12 sea miles from shore to give them the quarantine signal. The cannon-shot range is mentioned in an instruction of the Italian minister of the marine of June 20, 1866, also in an Austrian regulation of May 20, 1766, and in a treaty between England and Portugal of 1842. A regulation of the Austrian minister of finance of March 23, 1881, orders 4 sea miles as the limit in regard to regulations of the custom service. These examples may suffice to show that there exists no generally adopted practice of States in regard to this question.

From the fact that the 3-mile limit has not been generally recognized, a number of the most prominent German and foreign writers have drawn the conclusion that the extension of the coastal sea to the cannon-shot range in time of war as in time of peace is the law to be followed in case of doubt. In our judgment this has to be taken only *cum grano salis*. Of course an extension *beyond* a cannon's range is absolutely impossible, but one has to admit that the practice of the States seems to favor the limit of the coastal sea at less than a cannon's range. And such a restriction seems quite practical in time of peace, since the adjacent State in case of the extension of its coast control to the present range of a cannon would hardly be able to cope with the situation. We must, therefore, in general avoid calling the cannon's range the international limit of the States on the sea. We should rather define the law thus, *that every adjacent State has the right to extend its boundaries as far over the sea as it thinks necessary for its protection against disease, smuggling, etc., but it shall not trespass in the limit marked by a cannon's range*. This view is taken also by Martens and Wharton.¹ There is no doubt that no legislative act will suffice to extend the sovereignty of the coastal sea, wherever an international agreement and not a legislative act has restricted the limit to the distance of 3 sea miles.

The same doubt that exists as to the question of the limit of the coastal sea is raised as to where it begins, with the exception that the latter question has been seldom discussed. The Romans considered as the limit of the land the line reached by the highest tide. The same position has been taken by the *ordonnance sur la marine* of France of the year 1681. At the beginning of the present century

¹ Martens, *Revue générale de droit int. pub.*, 1894, p. 43. Wharton, *Journal de droit international privé*, 1886, p. 73.

Jakobsen¹ taught that the landmark of the coastal sea changed with the changes of ebb and tide, which view in spite of its apparent deficiencies found its way into section 16, ii of the Zollverein law of July 1, 1869, and which also found recognition in English constitutional law with regard to the field of jurisdiction of the admiralty as distinct from that of the common law. Yet most of the recent international agreements accept the low-water mark as the limit between coast and sea, as, for instance, the above-named treaty at The Hague in regard to the North Sea fisheries. Wheaton² considers as the beginning of the coastal sea the line where it begins to be navigable. So does Attlmayr.³ Both Perels⁴ and Stoerk refuse to have this question answered *in abstracto*. Perels considers as landmark the coast line up to the point where batteries still can be erected which at the highest tide will not be exposed to damage by the waves. Similarly, Kaltenborn.⁴ Stoerk considers "a landmark equally effective as to constitutional as well as international law at the line connecting those points upon which and from which solid Government buildings can be erected and maintained for the purpose of exercising control of the traffic on the marginal sea." To us the standpoint taken by the treaty at The Hague seems to be the simplest and to offer the most practical solution of the question. . . .

§ 4, page 20.—*The doctrine of the wide bays, straits, and canals up to the Resolutions of the Institute of International Law.*—Let us briefly consider two questions related to the coastal sea.

First, the question has been raised whether *wide bays* are subject to the laws of the coastal sea or if special norms must be applied to them according to their special nature, which has been maintained especially by England for some hundred years. Her principle was that all parts of the sea between two headlands to the line connecting the headlands are to be considered as part of the territory of the adjacent State. These British claims to the so-called "Kings' and queens' chambers," as the English call those parts of the sea, found a warm defense in Alberico Gentile's *Advocatio hispanica* (1613) and later in Selden's *Mare clausum*. Even to-day Phillimore, Kent, Wheaton, and Twiss⁵ hold the same opinion. Kent, according to this principle, claims for the United States the sovereignty of the Gulf of Mexico as far as a line drawn from Florida to the mouth of the Mississippi River (180 sea miles).

Compared with this the claims of the United States in 1793 to property in the Delaware Bay (only 15 miles in breadth) and of

¹ *Seerecht des Friedens und des Kriegs* (Altona, 1815), pp. 580, 585.

² *Op. cit.*, p. 168.

³ *Op. cit.*, p. 24.

⁴ *Op. cit.*, p. 342.

⁵ *Op. cit.*, vol. 1, p. 225.

England in 1872 to the Bay of Conception of the same breadth, appear as modest.

Those who defend such an extension of the sovereignty of the adjacent States can support their opinion by the fact that in this case the points of view are not identical with those in the question of the coastal sea. On the one hand, wide bays are not the roads of passage for seafaring peoples in general, but at the most for the ships bound for a port in the bay. This freedom of these bays does not lie so much in the interest of all nations as does that of the high sea. Besides, the actual control is considerably easier. There it is not the range of a cannon from the shore that decides. For if the adjacent State is able to control the entrance to the bay from the headlands, it is also master of the bay even if the breadth of the bay at other places far exceeds the double range of a cannon shot. Therefore the question is simply whether international law has recognized the convincing weight of these points of view.

To consider this would lead us too far afield and it may suffice to call attention to the fact that the modern practice of the States as well as modern science have proved little in favor of such often very far-reaching claims. The principle set up by England, except by writers named before, is contested by most of the others.¹ And it is significant for the practice of the States that the same England, for which an edict of James I, of 1604, extended the sovereignty over the King's Chambers, in the so-called "Territorial Waters Jurisdiction Act of 1878" restricts the limit to 3 miles.

Yet it can not be said that the extension of sovereignty over wide bays is entirely unfamiliar to the practice of States, although the English principle has not generally been recognized. Following the example of an older English-French treaty in regard to the Canal fisheries of August 2, 1839, of a French regulation of May 24, 1853, of a French fishing law of May 1, 1888, a publication of the British Board of Trade of November, 1868, containing a recognition of the sovereignty of the North German Confederation over its bay, the following resolution was adopted, in the above-named treaty at The Hague of 1882, signed by all Powers participating, and concerning the fisheries in the North Sea, Article II, section 3: "For the bays, a strip of 3 miles shall be measured from a straight line drawn across the bay in the part nearest to the entrance at the first point where the opening does not exceed 10 miles."²

Even before this treaty was concluded Perels called the regulation adopted in that treaty the customary law, while the other authors do not recognize any general regulation of this kind. But at the same time Perels claims that the right of the adjacent State only

¹ Perels, p. 41; Bluntschli, p. 185; Martens-Bergbohm, p. 383; Cussy, p. 97.

² *Journal du droit int. privé*, vol. 10, 1883, p. 101.

pertains to an exclusive right of fishing, being therefore of a nature entirely different from the sovereignty of an adjacent State over its coastal sea, although the publication of the English Board of Trade identifies the two entirely, and in section 1 says of bays and coastal seas "must be considered as under territorial sovereignty." The position taken by Perels is absolutely inconceivable to us. The justification of the extension of the sovereignty of the adjacent States over the marginal seas lies for us in the possibility of an actual control from the shore at the range of a cannon. Since to-day the range of a cannon reaches somewhat farther than 10 sea miles, and since a bay can be entirely controlled if its entrance is under control, it is only logical to infer that if the entrance of a bay does not exceed 10 sea miles the bay as such is property of the State or State's territory, but since from the entrance of a bay the nearest strip of the open sea can be controlled, the zone of the marginal sea proper begins from a straight line closing the bay. Can there be a reason to maintain that on the coastal sea the State is sovereign but not in the bay? We know none.

As the question of bays and creeks is related to the question of the coastal sea, so is that of straits. But here also different points are to be considered. Just to mention one, even he who with Bynkershoek and his followers concedes to the adjacent State the right to refuse passage to foreign ships will never maintain the same opinion if the coastal sea happens to cover a strait and, so to speak, forms the bridge between two seas. This could not be in harmony with the freedom of the sea.

Thus the doctrine and practice of the extension of the sovereignty over the straits have their own history, which we do not deem necessary to discuss.¹ We shall briefly note the position of the question before the resolutions of the Institute of International Law. There existed an agreement as to the distinction between smaller straits, which, controlled from both sides by the adjacent State, only were important for national navigation,² and the straits necessarily used for international navigation. The first kind we find, without any objection, classed with the coastal sea.³ The latter is treated by most of the writers according to the principles of the coastal sea, with the exception that all believe it necessary to emphasize that in the latter kinds of straits free navigation shall under no conditions be hindered, even if the adjacent State would have the right in the other coastal sea.⁴ A few even were of the opinion that the adjacent State had to be denied every claim to sovereignty in order to insure free passage

¹ Cf. Godey, pp. 26-34.

² For instance, the Solent, the Alsund, the Fehmarnsund, the Kalmarsund, and others.

³ Perels, p. 37; Martens-Bergbohm, p. 101; Cauchy, I, p. 42; Kaltenborn, I, p. 345; Calvo, I, p. 340.

⁴ Besides Perels, Mertens-Bergbohm, Cauchy, Kaltenborn, and Calvo, see Cussy, I, p. 98, and Stoerk, p. 516.

through such straits.¹ But this would be a great injustice to the adjacent State, for its need for protection is not less here than in the coastal sea. In this respect Calvo, who otherwise denies the sovereignty of the adjacent State over the straits, says:

This liberty of access and passage always admits restrictions included in the right of conservation of the States over the coast on which the straits are situated, and since the formation of the straits compels the ships sailing through to pass under the fire of the guns placed on one of the coasts or the other, the sovereign who is master of the coast has the incontestable right to control the navigation and to take every precautionary step, especially in time of war, which prudence and care for its safety may render necessary.

The artificial canals follow the law of the straits.² But already regulations have by agreement replaced in several cases the laws sanctioned by usage for the straits as well as for the canals.

§ 5, page 27.— . . . In December, 1895, the Dutch Government sent a note to the Powers inviting them to an international agreement based upon the resolutions of the Institute with regard to the coastal sea. In one point the resolutions have been considerably changed. The note proposes to set a certain mile limit also for the second zone of neutrality and that this zone shall become obligatory in case of war. We do not see any improvement in this change. To *compel* the adjacent State to extend its zone of neutrality probably to 20 kilometers from the coast means to impose a burden upon it which in many cases it may not be able to bear and which may lead it into complications with the belligerents. For with the *right* of such a territorial extension of neutrality the State would accept also all its duties. This seems to us impracticable. For the neutrality of the coastal sea should serve to protect the adjacent State against the effects of an act of war at sea upon its territory. This need of protection reaches as far as the guns of the belligerents. If, therefore, the zone of neutrality would by agreements be fixed according to range of our modern cannons in case of war this range might have changed again and the limit agreed upon would not be sufficient to the adjacent State. Therefore we think it to be *more* in the general interests of the nations to follow the Institute and to leave it to the States in question to determine the extent of the neutrality of their territorial sea in case of war. At present let us consider the cannon's range a rational maximum which the adjacent State shall not transgress.

We do not agree with Godey, who denies the possibility of actual control of the coastal sea at a cannon's range and who declares himself against such an extension of the zone of neutrality. We answer

¹ Cf. those cited in Perels, p. 88, notes 1 and 2.

² Godey, pp. 35-50.

him, that according to the Institute the adjacent State is in no way compelled to extend its neutrality so far. It is left to its judgment to what distance it considers itself able to maintain neutrality and accordingly to fix the limit. If the State comes to the conclusion that the range of a cannon is not convenient, the limit may be drawn nearer and after due consideration this will be done. On the other hand there is no reason why a State possessing an efficient coast defense supported by its fleet should not be able to control its coastal sea to the extent of a cannon's range and to maintain its neutrality.

Godey contends that an extended zone of neutrality in case of war would mean a restriction of the battle field; if this were so, we would consider it as a decided progress. For war at sea within a field used by everybody is a far greater menace to the neutral States than war on land where the battle ground is confined to the belligerent States. Thus it must be in the interest of neutral States if an extension of the zones of neutrality will at least within this zone protect them against injuries of a contest in which they do not take part. Such a restriction of the battle field may be a disadvantage to the belligerents, as they may have to give up certain tactics in a certain place which would promise them great success. Therefore, Godey infers that in such a case they would not pay any attention to the zone of neutrality of a second-rank power. Of course, it may happen that a State will trespass upon an established international rule, but is it customary to give up a law because a single party may overstep it? If we wish to adhere to a body of international law as such, we must rather disregard entirely the question whether the individual principles thereof can now be carried into execution forcibly, if necessary, with the help of a higher force, as in civil law. We think the history of international law shows "that a general international interest requires respect for the rights of a third party even at the cost of personal advantage." Those who deny this would cripple every right of neutrality.

We can not understand why Godey should replace the limit of the territorial sea proposed by the Institute by the range of eyesight or the horizon of a man standing at the coast. This means breaking off with everything in use at the present time. The history of international law knows of only one application of this principle in an ordinance of Philip II of Spain. Yet Godey calls it *consacré dans la pratique*. Bynkershoek criticizes this view as follows:

Indeed it is too lax, it is vague and in no way certain enough. How far does eyesight reach, and shall it begin at a certain place on the land, or on the shore, or on a castle, or in a city, or the distance that a person can see with the naked eye, or a person having a very sharp eyesight; certainly not so far as

those sharp-sighted ones, as the ancients tell us, who could see Carthage from Sicily.

At the beginning of our century Gérard de Rayneval defended this limit.¹ But nobody has followed him either in theory or practice. It was left to Godey to discover that this limit is the safest and the most permanent. He does away with all arguments showing how different the horizon is according to the position of the person, by the proposition that we view the sea from a point 10 meters above the surface. From such a point he says one can see to a distance of 6 miles. According to him optical instruments would not extend the sight but would bring the picture only nearer to the eye. But why should the spectator not ascend a tower of 20 meters? He could probably see to a distance of 10 miles. Godey's idea lacks logical foundation and we need not consider it any further.

I. THE COASTAL SEA IN TIME OF PEACE.

§ 6, page 31.—*The duties of the adjacent State.*—First let us consider the effect which the sovereignty of the adjacent State over the coastal sea has in *time of peace*. It depends, like the sovereignty over every other part of the State's territory, upon the legal basis of international recognition. The first duty of the adjacent State is the permission of innocent navigation to foreign ships, no matter for what purpose. This duty is placed upon the coastal sea as an international servitude. The English Lord Chancellor Cairns, who at the occasion of introducing the Territorial Waters Jurisdiction Bill claimed that the navigation on the channel near the English coast was nothing but a concession of the English Government, contradicted by so doing a law which since Hugo Grotius had been established in the practice of the nations and in the teachings of scholars. The idea of refusing innocent passage to foreign ships is not in accord with the purpose of the sea and therefore this idea is generally condemned. There are only two points to be mentioned. First, the adjacent State shall not impose a duty for this permission² even if it has gone to considerable expense for the means for its own protection on the coastal sea. A recompense is given in the navigation of the ships of this State free of duties on foreign seas. Furthermore, the adjacent State shall not make any distinction between foreign merchant and war ships. The latter also shall have the right of free passage, of course, only in case of *passage inoffensif*, as expressed in Article V of the resolutions of the Institute. Since the adjacent State has the right to refuse entrance to battleships into its ports or to limit their number for the sake of safety, this right

¹ Cf. Godey, p. 18.

² Twiss, p. 258.

certainly must be permitted to be applied to the marginal sea as soon as the passage would be anything else than mere passage. Nobody would want to force an adjacent State to permit a great number of battleships of a Power with which it has strained diplomatic relations to gather or to cruise in its territorial sea in order to begin action at once in case of war.

Political considerations have in many cases led to the regulation of the right of free passage of battleships for certain seas by agreement. Thus Article 29 of the Berlin treaty of July 13, 1878, provides that the port of Antivari, as all ports belonging to Montenegro, shall be closed to battleships. Articles 11 and 12 of the treaty of Paris of March 30, 1856, had declared the Black Sea neutral and had forbidden navigation of all battleships. The neutrality of the Black Sea was abolished by the treaty of London, March 13, 1871, after Russia had withdrawn from the former treaty on October 31, 1870, but even by the treaty of London, 1871, the Bosphorus and the Dardanelles were closed to foreign battleships. Yet the Sultan should be entitled to grant passage through those straits to battleships of friendly nations if this would be necessary to execute the treaty of Paris of 1856.

The second duty of the adjacent State can not be formulated so easily, namely, the duty to make navigation safe. In former times, when the people prayed for rich stranded goods they certainly were not conscious of this duty. But a higher understanding has taught the nations that it is in their general interest to prevent such accidents. To-day the President of the United States is entitled in times when navigation is specially dangerous to send out cruisers for the purpose of assisting ships of all nations within the American seas. For the same purpose Chile and Argentina keep special government ships in the Strait of Magellan and on the coasts of Fireland. The German Society for the Rescue of the Shipwrecked spends every year enormous sums in aid of those shipwrecked; all civilized nations endeavor to lessen the dangers of navigation in their seas by means of lighthouses and other institutions.

In 1894 at the session of the Institute at Paris it was proposed to charge the adjacent States to provide in their waters all necessary means for the safety of navigation. Quite correctly, Strizower replied to this proposition that the recognition of such an international duty would have unpleasant consequences. Every proprietor of a ship lost on a coast especially dangerous by its very nature would ask damages from the adjacent State, contending that the regulations of safety on that coast were insufficient. Many Powers of second rank could by diplomatic pressure be forced to pay considerable sums. Besides this, experience shows that among civilized nations there is

no need of coercion for the institution of protective measures in the coastal sea, for they will be enjoyed not only by the foreign but not less by its own ships. But if the adjacent State is not able to arrange for the necessary institutions, then the joined effort of the civilized nations will fill the needs, as is shown by the erection of the lighthouse at Cape Spartel on the coast of Morocco. Thus this duty of the adjacent State is to be considered as a *naturalis obligatio* based on the principle of ethics of the society of States and as such being generally respected, but its neglect does not imply the consequences of the neglect of a legal obligation.

The Institute followed Strisower in rejecting the said proposition.

§ 7, page 34.—*The rights of the adjacent State in the coastal sea.* The sovereignty on land includes the right of appropriation of unappropriated ground, but this does not hold true with regard to the coastal sea. The same must be said of many other manifestations of sovereignty, yet the latter is shown in various ways.

First may be mentioned the right of monopoly of the coastwise freight traffic for national ships only. The laws of the different States relating to it vary greatly. Holland, Belgium, England, Brazil, China, and Japan do not make any use of this right. Denmark, Spain, Italy, Greece, and Sweden maintain the condition of reciprocity. Portugal, France, Norway, Russia, and the United States reserve coastal freight traffic for their citizens. So does the German Empire in a special law of May 22, 1881. Section 1 reads:

The right to load goods in a German port and to ship them to another German port is reserved exclusively to German ships.

But the same law includes a concession by agreement of this right to subjects of foreign States.

Of special importance for the inhabitants of the coast is the exclusive right of the *coast fisheries* by natives. Agreements concerning concessions go back to the fifteenth century. To-day this right has been mostly restricted to the 3-mile zone, especially by treaty at The Hague on May 6, 1882. Besides the participants of this treaty, Russia and Norway also have reserved the fisheries in their coastal sea; Italy sells the license to foreigners, while the United States, Greece, Portugal, and the Netherlands grant free fisheries to their natives as well as to foreigners.

These regulations protect the interest of the inhabitants of the coast, while the exercise of the *marine police* by the State is also greatly desirable for foreign ships. They are therefore subject to it. Article VIII of the resolutions of the Institute reads:

Ships passing through the territorial seas shall be subject to the special regulations of the adjacent State in the interest and for the safety of navigation and sea control.

To these regulations belong the rules for the German regulations of signals of distress and those for the pilots for ships at sea and those in the coastal sea; also the regulations of the signals for the prevention of collisions and those regulating the action following collisions, and, finally, the law of July 27, 1877, concerning the investigation of sea accidents. As resulting from the sea police in the coastal seas are to be considered the German Strand regulations of May, 1784. The international telegraph treaty of March 14, 1884, leaves the protection of the submarine cable within its coastal sea to the adjacent State. An English law of August 5, 1885, a Greek law of December, 1885, an Italian law of January 1, 1886, a French law of December 20, 1884, and a circular of April 22, 1888, contain regulations of this kind.¹ . . .

An important manifestation of the sovereignty of the adjacent State is the right of *customs police*. In defending the extension of the sovereignty over the coastal sea we said that the control for the execution of the custom system must necessarily be extended over the coastal sea in order to be effective. This control includes the right to board a ship suspected of smuggling and to stop it for the purpose of searching it and to take possession of its cargo. Because the 3-mile zone is entirely insufficient for this purpose, most of the States have extended the regulations of the customs system far beyond this zone. France, for instance, has extended it to a distance of 11 sea miles; the United States, and until lately Great Britain, extended it 12 sea miles. According to Perels, such regulations can not claim recognition by foreign ships. Actually, as Stoerk says,² we have to do with a practice that has been in use for 100 to 200 years, which has never been contested. In our opinion, an objection would only be possible if the control were practiced in a part of the sea which is to be considered as open sea; that is, beyond the range of a cannon, which may be taken to-day as 12 sea miles (22 kilometers). . . .

Of great importance in our century is also the *sanitary police*. In this field also the State is allowed to extend its protective regulations over the coastal sea. In vain it has been tried by four Congresses to establish a uniform regulation of the quarantine system and at present it is left to be regulated by each State. According to an English law³ every ship coming from a port where a contagious disease rages and nearing the English coast shall give the quarantine signal. Perels considers this order as absolutely not binding. We

¹ Cf. also the German law in execution of this treaty of Nov. 21, 1887; *R. G. Bl.*, 1888, p. 151, and *R. G. Bl.*, 1888, p. 169. [The French decree promulgating the convention was dated April 23, 1888; the circular instructions (*post*, Supplementary Documents) were of date July 31, 1888.]

² *Op. cit.*, p. 476.

³ 26 Geo., II.

might make its validity depend upon the range of modern cannon shot.

The right of control by the coastal State would be meaningless if we would not admit the right to punish violations of the laws for the coastal seas. And in fact this right of jurisdiction *for this purpose* has always been recognized. Section 296a, R. St. G. B., decides that foreigners who fish without permission in German coastal waters will be fined up to 600 marks, or imprisoned for six months, also punished with confiscation of the fishing apparatus and eventually of the fish caught. Thus, section 3 says that the captain of a foreign ship that is illegally engaged in coast freight traffic shall be fined up to 3,000 marks. But the regulations also of the R. St. G. B. which, like section 145, impose fines for neglect of the regulations for preventing collisions of ships, etc., are to be applied without question to foreign ships on the coastal sea, although not with the same effect as those specially passed for foreigners. The only question is, if a transient foreign ship on the coastal sea of an adjacent State, simply by its entering, shall be submitted to the jurisdiction of the civil and criminal law of this State in every respect, and if the legislation of the State can be enforced in the coastal sea at all.

Leaving aside the difficult question of the legal position of foreign *ships* in the coastal sea, we shall consider the coastal sea as such. Although the question as to the laws extending to it is less important, yet there are a number of cases for which we have to answer them. Suppose, at a German sea resort a German and a Frenchman are swimming a certain distance together into the sea—that is, within the coastal sea. For some reason or other the Frenchman kills the German, probably by drowning him. The deed was witnessed by a third person and the evidence shows the Frenchman to have been the malefactor. Is the German court entitled to punish the Frenchman? From an international standpoint it would be. The deed was committed within the sphere of power of the adjacent State; it is apt to endanger the general safety and order in a most serious manner; the desire for justice of those who know of it requires that punishment be meted out. A question more difficult to answer is, whether the territorial law shall be applied. While v. Bar¹ wants all transgressions endangering the general safety punished by the adjacent State at once, Harburger² favors for this purpose an explicit extension of the legislation over the territorial sea. But Vesque von Pütlingen³ considers the coastal waters of the Adriatic as belonging to the Austrian territory and jurisdiction. The same view

¹ *Op. cit.*, vol. 2, p. 616.

² *Op. cit.*, p. 21.

³ *Hdb. des in Oestreich gelt. internat. privatrechts*, Vienna, 1860, p. 25.

is taken by Hugo Meyer,¹ Liszt,² and Binding.³ The latter maintains that under territory in the sense of the R. St. G. B., section 3, not the territorial *land* but rather territorial *power* is to be understood. His view is accepted by Olshausen.⁴ Another view is taken in an older opinion in Goltdammer's *Archiv*.⁵

From our standpoint of full sovereignty over the coastal sea, we follow Meyer, Liszt, and Binding. If the coastal sea really is "inland"—i. e., part of the sovereign territory of the State—then the State's laws must be applied to it. Even if we agree with Harburger that "inland" means only the territory as it existed when the law was passed, yet the coastal sea does not fall under the subsequently extended boundaries which are discussed by him very carefully. Either the coastal sea in 1871 was "inland" as to-day, or to-day it is not yet "inland," for no legislative act has given it this character. Harburger bases his opinion upon the fact that several special laws explicitly mention the coastal sea as part of the territory where these laws shall be enforced. But how can it logically be inferred that generally the R. St. G. B. could not be applied to the coastal sea simply because section 296a forbids foreigners to fish within the coastal sea, while otherwise the fisheries are free to everybody? This conclusion would only be justified if there were somewhere in the R. St. G. B. a law imposing a fine upon foreigners for fishing in waters which otherwise would be free. If in addition to that the legislature had created section 296a, then one could justly say that he (the legislator) had taken the stand, that generally the laws were not binding for the coastal sea.

And similarly in all other cases.

In the case given according to section 3 of the R. St. G. B., the Frenchman would be punishable like a German for a crime committed inland. There is no need to mention more examples. Let it suffice to extend the consequences of the principle of the inland character of the coastal sea to *private* international law. Here also the entire material right must extend over the coastal sea. Let us take again two swimmers, this time in a French resort. While swimming in the coastal sea, probably resting a while on a sand bank, they make a bet which one will first reach the shore. The place where the bet was made is the coastal sea and since according to French law the place where the bet is made decides the norm, a possible suit will have to be entered in the French court.

¹ *Lehrbuch des strafrechts*, 5th ed., 1895, p. 118.

² *Ibid.*, 7th ed., 1896, p. 86.

³ *Die Norman*, 2d ed., vol. i, 1890, p. 406.

⁴ *Kommentar zu den strafgesetzen des deutschen Reichs*, 1892, vol. 1, p. 55.

⁵ Vol. 15, p. 77, Nov. 28, 1866.

TAYLOR: *A Treatise on International Public Law.* Chicago, 1901.

Page 137, § 104.—Jurisdiction over 3-mile zone.—At the very outset the Government of the United States adopted provisionally that rule of international law which extends the jurisdiction of a nation over the littoral seas surrounding it to the extent of 3 miles from low-water mark;¹ and at a little later day it was declared that “our jurisdiction has been fixed (at least for the purpose of regulating the conduct of the Government in regard to any events arising out of the present European war) to extend 3 geographical miles (or nearly 3½ English miles) from our shores, with the exception of any waters or bays which are so land-locked as to be unquestionably within the jurisdiction of the United States, be their extent what they may.”² And in order to remove all ambiguity it was finally declared that it may be regarded “as settled, that so far as concerns the eastern coast of North America, the position of this department has uniformly been that the sovereignty of the shore does not, so far as territorial authority is concerned, extend beyond 3 miles from low water mark, and that the seaward boundary of this zone of territorial waters follows the coast of the mainland, extending where there are islands so as to place round such islands the same belt. This necessarily excludes the position that the seaward boundary is to be drawn from headland to headland, and makes it follow closely, at a distance of 3 miles, the boundary of the shore of the continent or of adjacent islands belonging to the continental sovereign.”³ While, within such limits, the sovereign of the shore may arrest, by due process of law, persons charged with crime on board foreign merchant ships, and may require that nothing be done by ships of friendly powers by which the peace of the shore may be disturbed, the claim to territorial jurisdiction within the 3-mile zone can not be extended to ships using the ocean as a highway, and not bound for a port within such jurisdiction.⁴ It is asserted by a few publicists that with the increasing range of great guns States should have the right of their own motion to extend the limits of their jurisdiction over littoral seas. As Hall has expressed it: “It is probably safe to say that a State has the right to extend its territorial waters from time to time at its will, with the now increasing range of its guns, though it

¹ Mr. Jefferson, Secretary of State, to the Minister of Great Britain, Nov. 8, 1793. Wharton, *Int. Law Dig.*, vol. 1, § 32.

² Mr. Pickens, Secretary of State, to Governor of Virginia, Sept. 2, 1796.

³ Mr. Bayard, Secretary of State, to Mr. Manning, Secretary of the Treasury, May 28, 1886: “The exclusive jurisdiction of a nation extends to the ports, harbors, bays, mouths of rivers, and adjacent parts of the sea enclosed by headlands, and, also, to the distance of a marine league, or as far as a cannon-shot will reach from the shore along its coasts.” Mr. Buchanan, Secretary of State, to Mr. Jordan, Jan. 23, 1849. Wharton, *Int. Law Dig.*, vol. 1, § 32, pp. 101, 107, 108.

⁴ Henry on Adm. Jur. (1885), § 89; Martens, *Précis*, I, pp. 144; Bluntschli, § 302; Heffter, § 75; Klüber, I, § 130; Ortolan, I, p. 133.

would undoubtedly be more satisfactory than an arrangement upon the subject should be arrived at by common consent.”¹ It is very difficult to conceive upon what theory or by what authority any State acting alone could do any such thing, as the existing jurisdiction rests solely upon common consent as manifested by usage. In the *Franconia* case it was expressly held that Great Britain could only acquire jurisdiction over the 3-mile zone encircling her coasts through the adoption of the general rule of international law by which it is conferred.²

Page 278, § 229.—Bays, gulfs, or recesses in coast line—Curtailment of unreasonable claims.—In the absence of any generally acknowledged standard as to their size and conformation it is difficult to determine in any given case whether or no a bay, gulf, or recess in a coast line can be justly regarded as territorial water. England once claimed the inclosed parts of the sea along her coasts known as the King’s Chambers, including the waters within lines drawn from headland to headland;³ the entire Bristol Channel between Somerset and Glamorgan is probably considered British territory;⁴ and the Privy Council has lately held that the Bay of Conception, which is 15 miles wide and which penetrates 40 miles into the interior, is a part of the territorial waters of Newfoundland.⁵ Germany and France are inclined to limit their claims to such bays, gulfs and recesses as are not more than 10 miles wide at their entrance, measured in a straight line from headland to headland. The latter claims, however, the whole of the oyster-beds in the Bay of Cancale, the entrance to which is 17 miles wide, the cultivation of such beds by local French fishermen making the case exceptional. At an earlier day the United States was inclined to claim dominion over a wide extent of the adjacent ocean. “Considering,” says Chancellor Kent, “the great extent of the line of the American coasts, we have a right to claim for fiscal and defensive regulations a liberal extension of maritime jurisdiction; and it would not be unreasonable, as I apprehend, to assume for domestic purposes connected with our safety and welfare the control of waters on our coasts, though included within lines stretching from quite distant headlands,—as, for instance, from Cape Ann to Cape Cod, and from Nantucket to Montauk Point, and from that point to

¹ *Int. Law*, p. 127, ed. 1880. See 32 *Alb. Law Jour.*, p. 101. A slight modification was subsequently made in Hall’s text. See p. 160, 4th ed.

² Taylor, p. 88, *seq.*

³ James I made a proclamation as to these chambers in 1604, and their limits, including considerable areas, were “arrived at by a jury of twelve sworn for the purpose, and their finding was presented to Sir Julius Caesar, Judge of the Admiralty, on March 4, 1604.” Walker, *Science of Int. Law*, p. 170, note 3. While the ancient claim of Great Britain within such limits has been forgotten, it has never been formally withdrawn.

⁴ Such seems to have been the decision in *Reg. v. Cunningham*, Bell’s *Crown Cases*, 86. “Possibly, however, the court intended to refer only to that portion of the channel which lies within Steepholm and Flatholm.” Hall, p. 162, note 2.

⁵ *Direct U. S. Cable Co. v. Anglo-American Tel. Co.*, 2 App. Cas., 394.

the capes of the Delaware, and from the south cape of Florida to the Mississippi.”¹ While Chesapeake and Delaware bays and other inlets of a like character are still considered as territorial waters,² the general policy of this government, conforming itself to the opinion of the civilized world, clearly tends toward the curtailment of any unreasonable claim to jurisdiction outside of the marine league.³

§ 230.—*Straits less than 6 miles wide an exception.*—There is a general disposition to regard all straits only or less than 6 miles wide as wholly within the territory of the State or States to which their shores belong. When they have more than that width the space in the center outside of the marine league limits is considered as open sea. As a notable exception, however, to the general rule that territorial rights can not be extended over straits more than 6 miles wide reference may be made to the final settlement of the northwest boundary line between Great Britain and the United States originally provided for in the treaty of 1846,⁴ which declared that such line should follow the forty-ninth parallel of latitude to the middle of the strait separating Vancouver’s Island from the continent, and thence down the middle of the Strait of Fuca to the Pacific. When disputes as to the title to certain islands arose the boundary question was submitted under the treaty of 1871⁵ to the arbitration of the German emperor; and in 1873 a protocol, signed for the purpose of carrying out his decision, extended the line for 50 miles to the Pacific through the middle of a strait 15 miles wide, after passing it across a body of water 35 miles long and 20 miles wide.⁶

§ 231.—*Territorial waters connecting parts of high seas.*—*Denmark’s “Sound dues.”*—When the territorial waters of a State, no matter whether an appropriated strait or marginal waters, form a channel of communication between two parts of the high seas, they are subject to the right of innocent passage in favor of all mankind for the purposes of necessary or convenient commercial navigation. In the days when the principle was admitted that the sea was subject to appropriation certain powers that owned narrow waterways claimed the right to exact tolls from foreign vessels passing up and down the straits. The most ancient and the most notable of such claims was that of Denmark, which enforced the prescriptive right to collect what were known as “Sound dues” upon the vessels of other powers passing to and fro from the North Sea to the Baltic through

¹ *Comm.*, I, 30.

² Wharton, *Int. Law Dig.*, §§ 27, 28. When, in 1793, the English ship *Grange* was captured by a French vessel in Delaware Bay, it was restored upon the ground of the territoriality of its waters. *Am. State Papers*, I, 73.

³ See Taylor, p. 137.

⁴ *Treaties of the U. S.*, p. 433.

⁵ *Ibid.*, p. 478.

⁶ For the award and protocol, see *Compilation of Treaties in Force*, 1899, pp. 255–258. See also *Parl. Papers, North Am.*, No. 10, 1873.

the Sound or the two Belts.¹ During the Middle Ages those who were subjected to such exactions often negotiated treaties with her to regulate their amount, and when they were increased to an excessive point, Sweden, Holland and the Hanse Towns went to war on that account.² Finally, under the growing pressure for free passage through all territorial waters that are channels of communication, Denmark, despite her prescription of five centuries, was forced in 1857 to surrender the Sound dues through the treaty of Copenhagen, in exchange for which the leading maritime States of Europe paid her a large pecuniary indemnity, received in the form of compensation for the future maintenance of buoys and lights.³ In the same year the United States, by a separate convention, became a party to the general settlement by agreeing to pay three hundred and ninety-three thousand and eleven dollars in consideration of Denmark's declaration that the Baltic should be open to American ships.⁴

§ 232.—*Rights of war vessels in territorial waters.*—There seems to be no good reason to doubt that the right of innocent passage, when claimed by vessels of States at peace with the territorial power, extends as well to vessels of war as to merchantmen, when the former are content to abstain from all illegal acts and to observe all reasonable regulations. The same principle that regulates the treatment of ambassadors applies to the reception of foreign men-of-war within territorial waters. No State has the right to forbid their passage through its straits from sea to sea even when they purpose to attack an enemy's vessel, or to bombard or blockade his ports. It has been held that the passage of a belligerent man-of-war over neutral territorial waters in no wise vitiates a capture subsequently made on the high seas or in seas under belligerent control. So long as they commit no hostile acts within territorial waters, or so near them as to endanger the peace and security of the people of the State to which they belong, their passage is "innocent,"—since that word,

¹As early as 1319 a charter regulated the dues to be paid by the Dutch; in a treaty made in 1490 with Henry VII, English vessels were forbidden to pass the Great Belt as well as the Sound, except in case of necessity, and then only upon the payment of certain dues; and in the treaty concluded in 1544 with the Emperor Charles V it was stipulated that merchants of the low countries visiting Danish ports should pay the same dues as formerly.

²The result was that in 1645, through the treaty of Christianstadt, Sweden was exempted from the tolls, the amount of which was for the first time definitely ascertained for the benefit of those who remained liable to them. In another treaty made between Denmark and the United Provinces of the Netherlands in 1701 all remaining obscurities were removed. These two treaties of 1645 and 1701 continued as the standards by which the rates due from privileged and non-privileged nations were measured. Wheaton, *Hist. Law of Nations*, 158–161; Schlegel, *Staats-Recht des Königreichs Dänemark*, pt. 1, chap. 7, §§ 27–29.

³Martens (*N. R. G.*) xvi, 331–345.

⁴*Treaties of the U. S.*, p. 238. The Government of the United States refused to become a party to the general convention signed by the five powers on the Baltic and North Sea (1) because it did not care to recognize the right of Denmark to levy the Sound dues; (2) because it did not care to involve itself in a question of purely European policy, a question involving "the balance of power among the governments of Europe."

as used in the phrase "right of innocent passage," refers to the character of the passage and not to the nature of the ship.

Page 293, § 247.—The marine league.—Grotius, Vattel, and Bynkershoek.—Under the Grotian doctrine of free navigation special claims of dominion over whole seas have vanished, leaving as survivals only the jurisdiction over bays, gulfs, mouths of rivers, parts of sea inclosed by headlands, and certain straits heretofore described as territorial waters. When to such waters are added, under the general usage of nations, the marine league, once the distance measured by a cannon shot from the shore, a definite and complete idea may be formed of the entire extent of a State's maritime territorial jurisdiction. The attempt has been made to establish the fact that the jurisdiction which each State possesses over its marginal waters (leaving out of view the exact width of the zone) is a creation of international and not municipal law. It is a right flowing from a general rule to which all nations are supposed to have given either an express or implied assent.¹ As to the right itself there can be neither cavil nor question, (1) because each State must possess it for the protection of the lives and property of its citizens on land against the violent acts of others whose States could not be held responsible without the recognition of the right of pursuit and capture; (2) because it is necessary to each State as an indispensable means for the effective execution of its revenue laws; (3) because without it no State can retain and protect the natural products of the sea for the exclusive benefit of its own citizens. And yet cogent as such reasons are the right was not defined in Roman law; and Grotius himself recognized it only in a vague and general way in the statement, relating evidently to gulfs and bays, in which he admits that a State possessing the land on either side should possess a portion of the sea, provided it is not such a portion "as is too large to appear part of the land."² Vattel,³ in discussing the same subject, only ventured to say that "the dominion of the State over the neighboring sea extends as far as her safety renders it necessary and her power is able to assert it; since, on the one hand, she can not appropriate to herself a thing that is common to all mankind, such as the sea, except so far as she has need of it for some lawful end, and, on the other, it would be vain and ridiculous pretension to claim a right which she was wholly unable to assert." In order to reduce such general statements to a definite and usable basis the practical Bynkershoek⁴ defined the marginal water necessary for the safety of a State to be such a space as could be covered

¹ See Taylor, p. 88 *seq.*

² *De Jure Belli ac Pacis*, II, c. 3, § 8.

³ *Droit des Gens*, I, c. xxxiii, § 289.

⁴ His maxim was, "Terrae potestas finitur ubi finitur armorum vis." *De Domin. Mar.* c. 2. See also Ortolan, *Diplom. de la Mer*, I, c. 8; Phillimore, I, c. 8; Twiss, I, § 172; Heffter, §75; Martens, *Précis*, §158.

by a cannon shot from the coast, that being considered in his day as substantially equivalent to the zone within a marine league of low-water mark.

Necessity for widening the zone.—With the substitution of the long-range guns now in use the conviction is growing that the old rule, so far as the width of the zone is concerned, should cease with its reason. In 1894 the Institut de Droit International indulged in an exhaustive discussion of the question, and there was no division of opinion as to the necessity of giving a greater breadth to the zone—a decided majority favoring a zone 6 marine miles from low-water mark as territorial for all purposes with the right in a neutral State to extend it in time of war for all purposes of neutrality, after due notice, to a distance from shore equal to the longest range of modern guns. It is idle, however, to talk of the substitution of a new rule without some kind of international concert.¹

§ 248.—*State legislation extending limit for health and revenue purposes.—Its validity.*—The conviction that the 3-mile limit is too narrow for health and revenue purposes prompted Great Britain to enact 26 Geo. II, providing that all vessels liable to quarantine shall be required to make signals to other ships within 4 leagues under a penalty; and 9 Geo. II, c. 35, and 24 Geo. III, c. 47 (Hovering Acts), assuming for certain revenue purposes a jurisdiction of 4 leagues from the coasts. The Congress of the United States by acts passed in 1797, 1799 and 1807 has authorized in the same way the seizure of vessels laden with certain cargoes within 4 leagues of the American coasts;² and many other maritime nations have made like enactments. Are such statutes, so far as they exceed the generally recognized limit, valid under the laws of nations? Wheaton contended that they were; but his annotator, Dana, after a careful review of the authorities cited to support that statement, concludes that “it may be said that the principle is settled, that municipal seizures cannot be made, for any purpose, beyond the territorial waters. It also settled, that the limit of these waters is, in the absence of treaty, the marine league or the cannon-shot. It cannot now be successfully maintained, either that municipal visits and search may be made beyond the territorial waters for special purposes, or that there are different bounds of that territory for different objects.”³ Dana’s assumption that the text of his principle is not sustained by the decisions of the Supreme Court of the United States is clearly untenable. Leaving out of view *Church v. Hubbard*⁴ as inconclusive, and admitting that *Rose v. Himely*⁵ is in conflict with the text, there is no good reason to

¹ See Taylor, p. 138.

² Cf. Wharton, *Int. Law Dig.*, §32.

³ Note No. 108 entitled “Municipal seizures beyond the marine league or cannon-shot.”

⁴ 2 Cranch, 187.

⁵ 4 Cranch, 241.

doubt that the case was overruled by *Hudson v. Guestier*,¹ in which it was held that "a seizure, beyond the limits of the territorial jurisdiction, for breach of a municipal regulation, is warranted by the law of nations." It does not follow, however, that the conclusion reached by Dana is untenable. No matter what the view taken by the highest court of any one nation may be, the fact remains that a rule to bind all must have the assent of all or nearly all. If the powers to which they belong object, upon what ground can any State, in matters of trade and health, "venture to enforce any portion of her civil law against foreign vessels which have not as yet come within the limits of her maritime jurisdiction? A State exercises in matters of trade for the protection of her marine revenue, and in matters of health for the protection of the lives of her people, a permissive jurisdiction, the extent of which does not appear to be limited within any certain marked boundaries, further than that it can not be exercised within the jurisdictional waters of any other State, and that it can only be exercised over her own vessels and over such foreign vessels as are bound to her ports."²

Page 311, § 268.—Immunity of private vessels in territorial waters—Views of Webster and Marshall.—When a private merchant vessel passes into the territorial waters of a foreign State immunity from local jurisdiction, as an incident of the doctrine of extritoriality, is reduced to a minimum by reason of the fact that the jurisdiction of the State to which the vessel belongs is forced to yield in a greater or less degree to that of the local sovereign. And yet as experience has demonstrated long ago that it is beneficial to commerce for the former to regulate everywhere the internal discipline of the ship, and the rights and duties of the officers and crew towards the vessel or among themselves, the tendency is for the latter to abstain as far as possible from interfering with such internal concerns.³ It is clear that the ship's company is not a mere collection of isolated strangers, but an organized body of men governed internally by the laws of the country to which the ship belongs. As Mr. Webster said in the case of the *Creole*, "the rule of law and the comity and practice of nations allow a merchant vessel coming into any open port of another country voluntarily, for the purpose of lawful trade, to bring with her and keep over her to a very considerable extent the jurisdiction and authority of the laws of her own country. A ship, say the publicists, though at anchor in a foreign harbor, possessess its jurisdiction and its laws. . . . It is true that the jurisdiction of a nation over a vessel belonging to it, while lying in the port of

¹ 6 Cranch, pp. 282–285. The quotation in the text is the language of the headnote.

² Twiss, 1, § 181, citing *The Apollo*, 9 Wheaton, 371; Kent's *Comm.*, tit. 1, § 31.

³ Cf. Ortolan, *Diplomatie de la Mer*, liv. II, ch. xlii, as to the tendency in France.

another, is not necessarily wholly exclusive. We do not consider, or so assert it. For any unlawful acts done by her while thus lying in port, and for all contracts entered into while there, by her master or owners, she and they must doubtless be answerable to the laws of the place. Nor if the master and crew while on board in such port break the peace of the community by the commission of crimes can exemption be claimed for them.”¹ As Chief Justice Marshall said in the *Exchange* case, “when merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society and would subject the laws to continual infraction, and the Government to degradation, if such individuals or merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country.”²

TESTA: Le Droit Public International Maritime. Paris, 1886.

[Translated from the Portuguese by Ad. Boutiron.]

Page 67.—There are certain parts of the sea whose situation near the land does not permit the use of the arguments employed against the right of property or domain. We do not apply here a general principle opposed to the liberty of the high seas; on the contrary, it is affirmed. The reason which supports the hypothesis of the impossibility of property or domain on the high seas here ceases to exist. We have to deal under this head with (1) ports and creeks, (2) gulfs and bay, (3) straits and interior seas, (4) portions of the sea which wash the coast.

Ports.—None of the reasons invoked against the right of property or domain of the high sea can be applied to ports or creeks situated on the territory of a State which possesses their shores and entrances.

In fact, there is no *impossibility* of occupation, defense, or maintenance of these portions of the sea in the exclusive and permanent possession of a State and of preventing all foreign action there. Likewise there is no *inconvenience* for one State or for all, since ports are not elements indispensable for the use of the sea by all nations. They do not constitute a channel for navigation; they are only the point at which a channel ends.

The exclusion which would result from closing the port to other nations would prejudice the interests of the nation which possesses

¹ Mr. Webster to Lord Ashburton, Aug. 1, 1842. *State Papers*, 1843, lxi, 35; 6 Webster's Works, pp. 303-318.

² The Schooner *Exchange v. McFaddon et al.*, 7 Cranch, 144.

it, but would not affect the liberty which others have of navigating in the open sea and the reciprocal exchange of their products. We can not doubt, therefore, that ports and creeks belong, under the title of *property*, to the nation which is mistress of the shore, and that this right of *property* gives rise to a right of *domain*. . . .

Gulfs and bays.—The considerations above advanced apply equally to gulfs and bays whose shores belong to the same Power, when the entrance or mouth is not so wide as to be unable to be commanded by the crossfire of artillery or when they are naturally defended by islands, banks, or reefs which render their permanent or effective possession possible.

We must, therefore, except from this category gulfs and bays of wide extent, which, in spite of their names, which they derive from their geographical configuration, are portions of the high seas. Here we include the Bay of Biscay, the Gulf of Guinea, the Gulf of Lyons, etc., which by their condition can not be subjected to the jurisdiction, much less to the property of the State whose shores they wash. . . .

Page 71—Territorial waters.—All nations, by virtue of their right of independence and the just reason of their security and defense, may establish rules for the admission of aliens to their territory and take such measures of vigilance as they may judge appropriate on their frontiers. Now, maritime frontiers, being by their nature susceptible of aggressions and unforeseen invasions—there being need for the repression or prohibition of fraudulent commerce or for the efficacy of sanitary regulations—it follows that a nation must exercise vigilance over vessels which attempt to approach its shores or come with some illicit object in view.

From the sea the natural limits of the State are the shores which border it, but in order that protection and vigilance may be effectively exercised it is admitted among nations, not only by numerous treaties but by general usage, that the maritime boundaries of a State are established by an imaginary line drawn at a suitable distance from the coast, following its sinuosities.

This imaginary line has been called the *line of respect*.

Territorial waters are those which occupy the space between this line and the shore.

Every ship within this line is said to be *within the waters of a State*.

The right of every nation to exercise vigilance over the waters which wash its coasts is based upon the right which it has to defend and guarantee its interests. Hence results the right of establishing rules there and employing force to maintain its authority.

But if the nation mistress of the shore has the right to close its ports, it can not make the claim of closing the territorial sea or for-

bidding passage there, even though it had the *material* means to do so; it could not morally make itself possessor of these waters, which are a part of the road open to navigation.

It results, therefore, that if the State has not the right of property over the territorial waters it nevertheless retains the right of domain or *jurisdiction* which can not be legitimately contested. This right ought to be exercised only within the limits in which acts of aggression could be effected or in which the territorial authority could effectively act.

Inspired by these considerations, publicists have adopted an opinion, which is most generally adopted: It is that this *line of respect*, the limit of the maritime frontier, is determined by the longest range of cannon, and comprises as territorial waters the space of sea which can be commanded by forcible means from the land, that is, the space, where, from the land, entrance may be forbidden, or whose extremity marks the point at which the coast may be threatened. The best demarcation of this limit is, as is apparent, the range of a cannon shot. Bynkershoek establishes this aphorism, *Terrae potestas finitur ubi finitur armorum vis*.

This usage of tracing a line of respect at the limit of the zone where attack and defense are possible, has not only the advantage of being the one most generally adopted but as being more practical and rational than those proposed by Valin and Rayneval. The first considered as territory that part of the bottom of the sea where the sounding line touched; for the second the visual horizon was the limit. . . .

Although the greatest range of cannon is the measure usually adopted, nothing prevents Powers from conventionally agreeing upon a greater extent to their territorial sea, with the object of common utility or for the better regulation of their respective commercial interests. Plainly these stipulations are only of value for the contracting parties.

Measures tending to prevent fraud or contraband, or maintaining the local police power are established by the sovereign State in its territorial waters and all nations are subjected to these rules.

It is a legitimate principle, although contested by some, that a ship which infringes the fiscal laws of a State in its territorial waters may not only be detained there but may be pursued and captured on the high seas. In this case it is necessary that the pursuit should have commenced within territorial waters and that it be continued without interruption and that the pursued vessel be never lost from sight. . . .

TWISS: *The Law of Nations Considered as Independent Political Communities.—On the Rights and Duties of Nations in Time of Peace.* Second edition, Oxford, 1884.

Page 231, § 144.—The Roman Jurists regarded certain things as incapable by nature of being appropriated. “Et quidem naturali jure communia sunt omnium hæc, aer, aqua profluens, et mare, et per hoc litora maris.”¹ It is obvious that the air, running water, and the sea, are not susceptible of detention, and consequently can not be physically reduced into possession, so as to give rise to that permanent relation, which is implied in the juridical notion of property. “Again nature does not give to man a right of appropriating to himself things which may be innocently used, and which are inexhaustible and sufficient for all. For since those things, while common to all, are sufficient to supply the wants of each, whoever should, to the exclusion of all other participants, attempt to render himself sole proprietor of them, would unreasonably seek to wrest the bounteous gifts of nature from the parties excluded.”² There is accordingly no warrant of natural law for an absolute right of property in the running water of rivers (*aqua perennis*) any more than in the tidal water of the sea. But if the free and common use of a thing of this nature (namely, which is of itself inexhaustible) be prejudicial or dangerous to a nation, the care of its own safety will entitle it so far, and so far only, to control the use of it by others, as to secure that no prejudice or danger result to itself from their use of it. A nation may accordingly have a *right of empire* over things which are nevertheless by nature *communis usus*, and over which it cannot acquire an absolute *right of property*; as, for instance, over portions of the high seas or over rivers which form the boundary of its territory. The limits, within which the safety of a nation warrants such an exercise of empire, will be considered hereafter.

Page 292, § 179.—It becomes necessary therefore to inquire what portion of the open sea is by the practice of nations held to be within the operation of the territorial law of a nation. “It is of considerable importance,” writes Vattel,³ “to the safety and welfare of States that a general liberty be not allowed to all comers to approach so near their possessions, especially with ships of war, as to hinder the approach of trading nations, and molest their navigation.” Upon this principle a neutral nation is held to be entitled to preclude belligerent powers from carrying on mutual hostilities upon the open sea within a certain distance of its coast. That distance, as between

¹ *Just. Inst.*, l. 11, tit. 1, § 1.

² Vattel, l. 1, § 280.

³ *Droit des Gens*, l. 1, § 288.

nation and nation, is held to extend as far as the safety of a nation renders it necessary, and its power is adequate to assert it; and as that distance cannot, with convenience to other nations, be a variable distance, depending on the presence or absence of an armed fleet, it is by practice since the introduction of firearms identified with that distance, over which a Nation can command obedience to its empire by the fire of its cannon.¹ That distance, by consent, is now taken to be a maritime league seaward along all the coasts of a nation. Beyond the distance of a sea-league from its coasts the territorial laws of a nation are, strictly speaking, not operative. It may happen that a nation chooses to extend its own laws over its national vessels wherever they may be navigated on the high seas, but however general and comprehensive the phrases used in the municipal law may be, they must be always restricted in their construction to the citizens of the State, to which the vessel belongs,² and to the mutual relations between such citizens, and cannot be extended to the vessels of other nations or to the persons on board of them.

Page 293, § 180.—Writers on public³ law have spoken of the open sea (*mare vastum*) within the distance of a maritime league along the coasts of a nation as its *maritime territory* (see *Gebiet*). If the law of nations be held to be a portion of the law of each nation in such matters as are within its scope, then there may be no valid objection to the use of the phrase *maritime territory* in the sense of territory subject to the law of the sea, but inasmuch as the term *territory* in its proper sense is used to denote a district within which a nation has *an absolute and exclusive right to set law*, some risk of confusion may ensue if we speak of any part of the open sea over which a nation has only a *concurrent right to set law*, as its *maritime territory*. It would tend to greater clearness if jurists were to confine the use of the term *maritime territory* to the actual coasts of a nation, or to those portions of sea *intra fauces terrae* over which a nation is entitled to *exclusive jurisdiction*, and over which its territorial law has paramount force and operation, and if they were to designate the extent of tidal waters over which the territorial law of a nation operates *concurrently* with the law of nations as its *jurisdictional waters*.⁴

Page 301, § 186.—The neutralization of portions of the sea, that is, the exclusion of foreign nations from the use of its waters for belligerent purposes, does not conflict with those considerations of natural right, which forbid the exclusion of foreign nations from the peaceful use of its waters. It may be regarded as an established rule of

¹ Bynkershoek, L. II, c. 3, § 13.

² The *Apollo*, 9 Wheaton's *Reports*, § 370.

³ Klüber, § 130. Wheaton's *Elements*, pt. 4, c. 4, § 6.

⁴ Mr. Justice Story has adopted this expression in his judgment in the *Schooner Fame*, 3 Mason's *American Reports*, p. 152.

public law, that a nation may prohibit all acts of hostility on the part of other belligerent nations within the limits of its maritime jurisdiction, including the open sea along all its coasts within the distance of a marine league. The same privilege is enjoyed in respect of bays of sea-chambers,¹ that is, portions of the sea cut off by lines drawn from one headland to another. The claim of neutrality, however, cannot be maintained to the extent of prohibiting the armed vessels of a belligerent power from passing over waters, claimed as neutral waters, with a view to an ulterior act of warfare against the enemy. The act of passing inoffensively over such portions of water without any violence committed therein is not considered as any violation of neutral privileges; such waters are regarded in times of war, equally as of peace, as the common thoroughfare of nations, and no permission is required for liberty to pass through them; although they are privileged so far, that no actual acts of hostility may be committed within them. In certain cases the privilege of neutrality seems to extend over portions of the sea, which are not within the ordinary limits of the maritime jurisdiction of a nation; as, for instance, over arms of the sea, and over broad straits, such, for example, as the strait which separates Ireland from Great Britain, commonly called St. George's Channel.² But this question belongs more properly to the rights of nations in time of war, and will be considered more fully in a subsequent part of this work. Bynkershoek makes one exception to the violation of neutral waters, and supposes that if an enemy should be attacked upon the high sea, and should take refuge within the jurisdictional waters of a neutral nation, the victor may pursue his vanquished foe *dum fervet opus*, and seize his prize within the jurisdiction of the neutral State. Casaregis and some other foreign jurists maintain a similar doctrine; but Valin, Emérigon, Vattel, Azuni, and others are of an opposite opinion, and hold that when the flying enemy has entered the privileged limits of the neutral jurisdiction, he is under the safeguard of the neutral power. Lord Stowell³ seems to consider that Bynkershoek's opinion is given with many qualifications, and expressly as an opinion which he did not find to have been adopted by any other writer, and Mr. Chancellor Kent⁴ regards Bynkershoek's opinion as rested by him entirely on the authority and practice of the Dutch, and not confirmed either by the writings of publicists or by the usage of Nations. He holds, accordingly, that the opposite doctrine rests upon sounder views. In this equally as

¹ Life of Sir Leoline Jenkins, vol. ii, p. 727, 728, 780. Opinion of the Attorney General of the United States on the case of the ship *Grange*, 14 May, anno. 1793, vol. i, p. 15. Waite's *American State Papers*, vol. i, p. 78.

² Martens, *Précis*, § 42.

³ *The Anna*, 5 Robinson, p. 385.

⁴ *Commentaries on American Law*, vol. i, § 120.

in any other case, a positive act of warfare would be in strict law a violation of the privilege of the neutral power, which is entitled to protect all persons and property within its maritime jurisdiction. It is the privilege, however, of the neutral power alone to insist on the restoration of property captured within its jurisdiction, and if there should have been extreme bad faith on the part of the worsted belligerent, as, for instance, if he should have lain in wait within the shelter of neutral waters with a view to sally out suddenly, and take his adversary at a disadvantage, with the intention, if he should be worsted, to take refuge again within the neutral waters, the neutral power may with reason decline to extend its shield over the vanquished, if the enemy whom he has attacked should pursue him *dum fervet opus*, and capture him within the maritime jurisdiction of the neutral power. It is sometimes a matter of treaty-engagement¹ between two nations, that neither shall permit the ships or goods belonging to the citizens or subjects of the other to be captured within cannon shot of their coast, or in any of the bays, ports, or rivers of their territory by the ships of war of a third power.

Page 309, § 190.—There is a certain class of cases which seem at first sight to conflict with the position that a geographical league seawards along its coasts is the limit of the maritime jurisdiction of a nation, and that beyond that distance its civil law is in operation only over its own national vessels. Thus the statute law of Great Britain (9 Geo. II, c. 35, and 24 Geo. III, c. 47), sometimes described as the Hovering Acts, authorizes the national cruisers to seize all merchant vessels which are found with certain cargoes on board destined for ports of Great Britain, if they are found within the distance of 4 leagues from the coast, and vessels so seized have been brought for adjudication before the tribunals of the seizors, and have been declared forfeited for an attempt at illicit trade. So, again, by 26 Geo. II, all vessels coming from places whence the plague might be brought, and as such liable to quarantine, were required to make signals on meeting other ships within 4 leagues² of the United Kingdom under a penalty of £200. In a similar manner the Acts of Congress of the United States of North America, such as the Collection Act of 1799 and the Act of 1807 against the importation of slaves, authorized the seizure of vessels laden with certain cargoes within 4 leagues of the American coasts. The regulations of Portugal and of Spain, excluding the commercial intercourse of foreigners with their respective colonies, were of an analogous character. Such laws and regulations, however, have no foundation of *strict right* against

¹ Treaty between Great Britain and the United States (Anno 1794), Art. 25. Martens, *Recueil*, V. p. 684.

² The distance, within which vessels are regarded as amenable to British quarantine regulations, is fixed at 2 leagues from the British coasts by 6 Geo. IV, c. 78.

other Nations. Lord Stowell, in the well-known case of the *Louis*,¹ alludes to an instance of this kind in the case of a Swedish ordinance authorizing Swedish cruisers to examine foreign vessels *on the high seas* bound to Swedish ports, which, however, was resisted by the British Government as unlawful, and the claim was finally withdrawn by the Swedes. In a similar manner Great Britain complained of the right claimed by Spain to search British vessels on the high seas, which was carried so far that the Spanish *guardacostas* seized vessels not in the neighborhood of their coasts. This practice was the subject of long and fruitless negotiations, and led at length to open war. Great Britain, however, did not contend that British vessels actually engaged in illicit trade were entitled to pass unmolested by the revenue cruisers of Spain until they came within the maritime jurisdiction of that country, but she maintained that Spain enforced her right of search for the protection of her commerce with her colonies in an unreasonable and vexatious manner. Mr. Justice Story² has properly pointed out that the State which authorizes her cruisers to effect such seizures beyond the limits of her maritime jurisdiction, incurs a responsibility toward foreign powers. It is only under the *comity of nations*³ in matters of trade and health that a State can venture to enforce any portion of her civil law against foreign vessels, which have not as yet come within the limits of her maritime jurisdiction. A State exercises in matters of trade for the protection of her maritime revenue, and in matters of health for the protection of the lives of her people, a permissive jurisdiction, the extent of which does not appear to be limited within any certain marked boundaries, further than that it cannot be exercised within the jurisdictional waters of any other State, and that it can only be exercised over her own vessels and over such foreign vessels as are bound to her ports.⁴ If, indeed, the revenue laws or the quarantine regulations of a State should be such as to vex and harass unnecessarily foreign commerce, foreign nations will resist their exercise. If, on the other hand, they are reasonable and necessary, they will be deferred to *ob reciprocam utilitatem*. In ordinary cases indeed, when a merchant ship has been seized on the open seas by the cruiser of a foreign power, when such ship was approaching the coasts of that power with an intention to carry on illicit trade, the nation, whose mercantile flag has been violated by the seizure, waives in practice its right to redress, those in charge of the offending ship being considered to have acted with *mala fides* and consequently to have forfeited all just claim to the protection of their nation.

¹ Dodson, p. 246.

² *The Mariana Flora*, XI Wheaton, p. 40. *Church v. Hubbard*, 2 Cranch, p. 235.

³ *Kent's Commentaries*, tit. 1, § 31.

⁴ *The Apollo*, 9 Wheaton, p. 371.

§ 191.—The right of fishery comes under different considerations of law from the right of navigation, as the right of fishery in the *open sea* within certain limits may be the exclusive right of a nation. The *usus* of all parts of the open sea in respect of navigation is common to all nations, but the *fructus* is distinguishable in law from the *usus*, and in respect of fish, or zoophytes, or fossil substances, may belong in certain parts exclusively to an individual nation. The practice of nations has sanctioned the exclusive right of every nation to the fisheries in the waters adjacent to its coasts within the limits of its maritime jurisdiction,¹ and accordingly we find that a permission for the subjects of one nation to fish within the jurisdictional waters of another nation is a frequent subject of treaty-engagement. “The various uses of the sea,” writes Vattel,² “near the coasts render it very susceptible of property. It furnishes fish, shells, pearls, amber, etc. Now, in all these respects its use is not inexhaustible, wherefore the nation to which the coasts belong, may appropriate to itself an advantage which nature has so placed within its reach, as to enable it conveniently to make itself master of it and to turn it to profit, in the same manner as it has been able to occupy the dominion of the land which it inhabits. Who can doubt that the pearl fisheries of Bahrein and Ceylon may lawfully become property? And though where the catching of (swimming) fish is the object, the fishery appears less liable to be exhausted, yet, if a nation has on its coast a particular fishery of a profitable nature, and of which it may render itself master, shall it not be permitted to appropriate to itself that natural benefit, as an appendage to the country which it possesses, and to reserve to itself the great advantages which it may derive by commerce, in case there be a sufficient abundance of fish to enable it to furnish the neighboring nations a supply? But, if so far from making itself master of a fishery, a nation has once acknowledged the common right of other nations to come and fish there, it can no longer exclude them from it; it has left that fishery in its primitive state of communion, at least with respect to those who have been accustomed to take advantage of it.” Treaty-engagements in such matters do not give any other right than that which is expressed in the specific terms, although there may be found in the recitals of certain treaties recognitions of rights founded on grounds independent of all treaties. Thus there are early treaties between France and England, under which it was agreed that the subjects of either crown might fish anywhere in the seas, which separate the two kingdoms, during certain seasons of the year. The legitimate inference, deducible from the fact that such fishery was made a matter of treaty-engagement, is, that at other seasons of the year the subjects of the two crowns had not a common right of fishing every-

¹ Wheaton's *Elements*, Part II, c. 4, § 5. Azuni, vol. 1, c. 11, art. 8.

² *Droit des Gens*, vol. 1, § 287.

where in those seas. The existing treaty-engagements between Great Britain and France proceed upon another view of mutual convenience, namely, that it is desirable to define the limits within which the general right of fishing upon all parts of the coasts of either Nation shall be exclusively reserved to its own subjects. The Convention of Paris (Aug. 2, 1839¹) has accordingly provided that the subjects of either State shall enjoy *an exclusive right* of fishery within a distance of 3 miles from low-water mark along the whole extent of its coasts. There is one peculiar provision in this convention, which deserves notice. By the ninth article it is stated to be the understanding of both parties that the distance of 3 miles, limiting the exclusive right of fishery upon the coasts of the two countries, shall be measured in the case of bays, of which the opening shall not exceed 10 miles, from a straight line drawn across from one cape to another.²

§192.—It appears from a notice issued by the British Board of Trade of the date of December, 1874,³ that the British Government came to an agreement with the North German Government in 1868 respecting regulations to be observed by British fishermen fishing off the coasts of the North German Confederation, and subsequently to a further agreement in 1874 with the German Government respecting regulations to be observed by British fishermen fishing off the coasts of the German Empire, and thereupon issued a notice for the guidance and warning of British fishermen. This notice implies a recognition upon the part of the British Government of the same principles of exclusive right to be enjoyed by German fishermen fishing off the North Sea coast of the German Empire, as it has recognized under the Convention of Paris (Aug. 2, 1839) in the case of French fishermen fishing off the coast of France, and as it has maintained in the same convention on behalf of British fishermen fishing off the British coast. The notice is of the following tenor: [Here follows the text of the "British notice to fishermen fishing off the coasts of the German Empire," printed *post*, p. 555.]

DE VATTEL: The Law of Nations, or the Principles of Natural Law applied to the Conduct and to the Affairs of Nations and of Sovereigns. Washington, 1916.

[Translation by Charles G. Fenwick.]

Page 107, § 287.—*The sea near the coasts may be subject to ownership.*—The various uses to which the sea near the coasts can be put

¹ *Post*, p. 524.

² This treaty, although operative in British waters, is not operative in French waters, not having been sanctioned by the French Legislative Chambers. Hertslet's *Treaties*, vol. xiv, p. 1200.

³ Hertslet's *Treaties*, vol. xiv, p. 1057.

render it a natural object of ownership. Fish, shells, pearls, amber, etc., may be obtained from it. Now, with respect to all these things, the resources of coast seas are not inexhaustible, so that the Nation to which the shore belongs may claim for itself an advantage thus within its reach and may make use of it, just as it has taken possession of the lands which its people inhabit. Who can doubt that the pearl fisheries of Bahrein and Ceylon may be lawful objects of ownership? And, although the supply of fish is less easily exhausted, yet if a nation has specially profitable fisheries along its coasts, of which it can take possession, are we not to allow it to appropriate that gift of nature as being connected with the territory it occupies, and to keep to itself the great commercial advantages which it may enjoy, should there be fish enough to supply neighboring nations? But if, instead of taking possession of its coastal waters, it should once recognize the common right of other nations to fish therein, it may no longer exclude them, having left those fisheries in their primitive condition of common property, at least with respect to those who have been making use of them. The English did not take possession from the start of the herring fisheries on their coasts, so that other nations have come to have a share in them.

§ 288.—*Another reason for appropriating the sea near the coasts.*—A nation may appropriate such things as would be hurtful or dangerous to it if open to free and common use; and this is a second reason why the Powers extend their sovereignty over the seas along their coasts, as far as they can protect their right. It is a matter of concern to their security and their welfare that there should not be a general liberty to approach so near their possessions, especially with ships of war, as to hinder the passage of trading vessels and disturb navigation. During the wars between Spain and the United Provinces, James I, King of England, defined his marginal seas as bounds within which he asserted that he would not permit any of the belligerent Powers to pursue their enemies nor to station warships in order to lie in wait for vessels seeking to enter or leave the ports.¹ These marginal seas, thus subject to a nation, are part of its territory and may not be navigated without its permission. But access may not lawfully be refused to vessels when their purpose is innocent and they are not under suspicion, since every owner is bound to grant free passage to strangers, even by land, when no harm or danger results from so doing. It is true that the nation itself is the judge of what it can do in the individual cases that arise, and if its judgment is unfair it violates its obligations, but other nations must submit. A different rule applies in cases of necessity, when, for example, a vessel is forced to enter the waters of another nation to seek shelter from

¹ Selden, *Mare Clausum*, lib. II.

a storm. In this case the right of entry into any port, provided no harm be done, or compensation be made where it has been done, is, as we shall show at greater length, a remnant of primitive common rights which no man can renounce; so that the vessel may lawfully enter without permission if it be unjustly refused.

§ 289.—*How far marginal waters may be appropriated.*—It is not easy to determine just what extent of its marginal waters a nation may bring within its jurisdiction. Bodin¹ claims that, following the common rule of all maritime nations, the sovereignty of the Prince extends as far as 30 leagues from the shore. But this precise determination could only be based upon a general consent of nations, which it would be difficult to prove. Each State may regulate as it thinks best the use of those waters as far as the affairs of its citizens, either with one another or with the sovereign, are concerned; but between nation and nation the most reasonable rule that can be laid down is that in general the sovereignty of a State over its marginal waters extends as far as is necessary for its safety and as far as it can be effectively maintained; because on the one hand a nation may appropriate only so much of common property, like the sea, as it has need for some lawful end (§ 281), and, on the other hand, it would be an idle and ridiculous pretension to claim a right which a nation would have no means of enforcing. The naval power of England gave occasion to its Kings to claim sovereignty over its marginal seas as far as the opposite shore.² Selden cites a solemn act,³ from which it appears that, in the time of Edward I, this sovereignty was recognized by the majority of the maritime nations of Europe, and it was recognized, in a certain degree, by the Republic of the United Provinces in the Treaty of Breda in 1667, at least to the extent of showing the honors of the flag. But in order to put so extensive a right on a sound basis, it must be clearly shown that all the powers concerned have given their express or implied consent. The French have never agreed to this claim on the part of England, and in the very Treaty of Breda of which we have just spoken Louis XIV would not even allow that the channel should be called the *English Channel* or *British Sea*. The Republic of Venice claimed for itself the sovereignty of the Adriatic Sea, and the ceremonies performed every year in connection with its claims are familiar to all. In support of that right are cited the example of Uladislas, King of Naples, of the Emperor Frederick III, and of certain Kings of Hungary, who requested of the Venetians permission to sail their vessels in that sea.⁴ It seems to me unquestionable that the Republic possessed sovereignty to a certain distance from its coasts, over an area which it could take

¹ *De la République*, liv. 1. chap. x.

² See Selden's treatise, *Mare Clausum*.

³ *Ibid.*, lib. 11, cap. xxviii.

⁴ See Selden's treatise, *Mare Clausum*, lib. 1. cap. xvi.

possession of and which it was important that the State should have jurisdiction over for its own protection; but I doubt very much whether in these days any power would be disposed to recognize the sovereignty of Venice over the entire Adriatic. Such claims of sovereignty are respected so long as the Nation which makes them is able to maintain them by force; they cease when it can no longer do so. To-day the area of marginal seas which is within reach of a cannon shot from the coast is regarded as part of the national territory, and consequently a vessel captured under the cannon of a neutral fortress is not lawful prize.

§290.—*Shores and ports.*—The shores of the sea belong unquestionably to the nation which possesses sovereignty over the territory of which they form a part, and they come under the head of public property. If the Roman jurists class them as the common property of all (*res communes*), it is with respect to their use only, and it should not be inferred that they considered them as not subject to sovereignty, for the contrary is evident from a great number of laws. Ports and harbors are still more clearly subject to, and even a part of, national territory, and consequently are the property of the nation. As regards the effects of ownership and sovereignty, all that is said of the land itself applies to them.

§ 291.—*Bays and straits.*—All that has been said of marginal seas applies more especially and with greater reason to roads, bays, and straits, inasmuch as they are even more capable of being effectively possessed and are of greater importance to the safety of the State. But I am speaking of bays and straits of small area, and not of wide stretches of sea sometimes called by these names, such as Hudson's Bay and the Straits of Magellan, over which sovereignty, and still less ownership, could not be claimed. A bay, entrance into which can be prevented, may be possessed and made subject to the laws of the sovereign; and it is important that this be so, since the nation might be much more easily insulted in such waters than along the coast which is exposed to the winds and the force of the waves.

§ 292.—*Straits in particular.*—It must be specially noted with regard to straits that when they connect two seas the navigation of which is common to all or to several nations, the owner of the strait cannot refuse passage to the other nations, provided such passage be innocent and without danger to the owner. To refuse to do so without good reason would be to deprive those nations of an advantage which is granted to them by nature; and besides, the right to such passage remains to them from primitive common ownership. But the care of its own safety authorizes the nation owning the strait to use certain precautions and to exact certain formalities, commonly regulated by the custom of nations. It has also the right to levy a moderate toll upon vessels which pass through, partly be-

cause of the inconvenience they cause in obliging the nation to be on its guard and partly as the price of the security given them against their enemies and against pirates, and of the expenditures entailed in the maintenance of lighthouses and buoys, and other things necessary to the safety of navigators. Thus the King of Denmark exacts toll in the Strait of the Sound. Such tolls should be based upon the same reasons and subject to the same rules as tolls on land or on rivers. (See §§ 103, 104.)

§ 293.—*Right to wrecks.*—Need we speak of the *right to wrecks*, that deplorable result of barbarous ages, which happily has almost everywhere disappeared with them? The only case in which it might exist with justice and humanity is where the owners of the rescued goods can not possibly be ascertained. The goods then belong to the first comer or to the sovereign, if the law reserve them to him.

§ 294.—*A sea inclosed within the territory of a nation.*—If a sea is entirely inclosed within national territory and connects with the ocean only by a channel of which the nation can take possession, it would seem that such a sea is no less susceptible of occupation and ownership than the land, and it should come under the same jurisdiction as the land surrounding it. The Mediterranean Sea was in former times completely surrounded by Roman territory, and the Romans, by making themselves masters of the strait connecting it with the ocean, could subject that sea to their sovereignty and claim the ownership of it. They did not violate, in so doing, the rights of other nations, since an individual sea is clearly destined by nature to the use of the countries and nations which surround it. Moreover, by barring the entrance to the Mediterranean against all suspected vessels the Romans secured at one stroke the whole extent of their coast-line, which was sufficient reason to authorize them to take possession of the strait; and as it was a means of communication with no other States than theirs, they had the right to permit or forbid the entrance into it, just as into their towns and their provinces.

§ 295.—*The parts of the sea held by a nation are under its jurisdiction.*—When a nation takes possession of certain parts of the sea it obtains sovereignty over them as well as ownership, for the same reason which we advanced in speaking of land (§205). These parts of the sea are under the jurisdiction of the nation and are included in its territory. The sovereign has authority over them, makes laws with respect to them, and may punish the violation of those laws; in a word, he has the same general rights there as on land, namely, all those conferred upon him by the law of the State.

It is true, however, that sovereignty and ownership are not essentially inseparable, even in the case of a sovereign State.¹ Just as a

¹ See book 2, § 83.

nation might have the ownership of an area of land or sea, without having sovereignty over it, so it might happen to have sovereignty over a place the ownership of which, or the property rights with respect to its use, might be vested in another nation. But the presumption is always that when a nation has the ownership over a place it has also the eminent domain, or sovereignty (§ 205). The inference from sovereignty to ownership is not so natural, for a nation may have good reason for asserting sovereignty over a territory, and especially over an area of the sea, without claiming any sort of ownership over it. The English have never made pretense to the ownership of all the seas over which they claimed sovereignty.

WESTLAKE: *International Law. Part I, Peace. Second edition. Cambridge, 1910.*

PURSUIT FROM TERRITORIAL WATERS TO THE OPEN SEA.

Page 177.—We have mentioned that the exclusive authority of the State of the flag in the open sea is subject to a perhaps doubtful exception for the case of pursuit lawfully commenced in territorial waters and continued without interruption in the open sea. This extension of the right of the territorial State was voted unanimously by the Institute of International Law in 1894, and was expressed to include the right of judgment in case of such capture for an offense committed within territorial limits, the capture however to be immediately notified to the State of the flag.¹ The doctrine has the sanction of, among others, Bluntschli² and Hall;³ and it may be regarded as the counterpart of the doctrine, admitted by Lord Stowell following Bynkershoek, that a belligerent capture may be made in territorial waters on a part of the coast where no damage can be done, if the contest began or the summons to submit to search was made outside those waters, and there has been a hot continuous pursuit.⁴ Indeed the case is stronger, for the right of pursuit is not necessary to war, but is necessary to the effective administration of justice and to the secure enjoyment of fishery rights in time of peace. And Sir Charles Russell, in his argument before the Behring's sea arbitrators, after quoting his official experience as attorney-general and assuming that that of the United States counsel was the same, stated that "there is a general consent on the part of nations to the action of a

¹ 18 *Annuaire*, p. 330.

² *Droit International Codifié*, §342.

³ §80.

⁴ *The Anna*, 5 C. Robinson, 373, 385d.

State pursuing a vessel under such circumstances [an offense against municipal law committed within territorial waters], out of its territorial waters and on to the high sea.”¹ It is true that the eminent advocate went on to say that it “is not a strict right by international law, but something which nations will stand by and see done, and not interpose if they think that the particular person has been endeavoring to commit a fraud against the laws of a friendly power.” But here, as so often, we are only encountering the difficulties which have their origin in the mistaken refinement which has been attempted about the name of law. In our sense of that word there can be no such thing as international law, if it does not exist in a case in which a general consent to it on the part of nations is admitted.²

In the arbitral award between the United States and Russia on the capture of the *James Hamilton Lewis* and *C. H. White*, sailing ships of the former nation, by the cruisers of the latter, it was declared that “the system of the party defendant, according to which the ships of war of a State are allowed to pursue even beyond the territorial sea a vessel of which the crew has committed an unlawful act in the territorial waters or on the territory of that State, cannot be recognized as conformable to the law of nations, because the jurisdiction of a State does not extend beyond the limits of the territorial sea unless an exception has been made to that rule by an express convention.”³ But the pursuit in those cases was commenced as well as carried on in the open sea. The Russian ships were cruising beyond their territorial waters, and we have the authority of the eminent arbitrator, M. Asser, for stating that he agrees with the doctrine of the Institute, and that the sentence quoted from his award must not be otherwise understood.

TERRITORIAL WATERS.

Littoral Sea and Gulfs.

Page 187.—We have seen that the open sea is not within the sovereignty of any State because it is incapable of occupation. But neither the reason nor the conclusion applies to such part of the sea as is sufficiently near the land. That part may be of two descrip-

¹ *International Arbitrations of the United States*, by J. B. Moore, vol. 1, p. 893.

² While it is necessary to point this out when quoting words used in the course of oral argument, we should do injustice to so eminent a jurist as Lord Russell of Killowen if we did not add our confident belief that on consideration, and with his pen, he would have recognized that the rule in question was law. He said that the consent was by acquiescence, but that, when general, is as binding as consent in writing: at least an English common-law judge could scarcely say otherwise. He admitted to M. de Courcel that the consent by acquiescence was “not in every case”; but with a context which shows that he contemplated no other limitation of the cases than that which is contained in the conditions of the rule, as that “it must be a hot pursuit, it must be immediate, and it must be within limits of moderation.”

³ *Revue de droit international et de législation comparée*, 2d series, vol. 5, pp. 83, 90.

tions. It may be a strip of a certain width extending along a coast and called littoral sea, or it may penetrate into the land as what is called a gulf. In either case it is capable of occupation by the sovereign of the land and therefore of becoming his territorial water. The means of occupation consist partly in the forts and batteries on shore, or in the shore itself considered as a platform from which guns not stationary can be fired, which are the means usually contemplated by writers on international law, and partly and not less really in the force which all maritime States maintain afloat. The analogy of the occupation of land shows that it is not necessary that every point of territorial water should at every moment be within the range of fire from a gun, even when we take guns afloat into account as well as those on shore. It is enough on *terra firma* that the sovereign's police should be adequate to render breach of his laws exceptional, and in general to punish it when it occurs. So much authority as that can be effectually provided in littoral seas and gulfs, and so far as it is possible to provide it the appropriation of those waters by the sovereign of the land is legitimate in principle. To complete the justification, however, there must be sufficient motive, nor is that far to seek. The sea is a source of wealth from fishing, including that of pearls and amber obtainable from its bed, and this, within the narrow part bordering on the land, would be a scene of anarchy if left to the free competition of the world. Within the same part also the bed of the sea is a source of wealth from minerals, obtained by subterraneous and subaqueous working from the land, and the control over it is necessary for the defense of the coast and the prevention of smuggling. Indeed the motive is so strong that it has often led, in waters of which the occupation is impossible, to acts inadmissible there by strict law because implying sovereignty, as in the hovering laws of many countries.¹ For the establishment of sovereignty the motive and the occupation must be combined.² For that purpose, in order to avoid difficult questions as to the actual force available, occupation is presumed to a geographical extent presently to be considered. Within that extent the water and its bed are territorial, and the wealth of both is the property of the territorial sovereign. Outside it the enjoyment of the sea and its contents is free to all, and any necessary or desirable regulation must be obtained by international treaties, as has often been done in fishery matters, notably by the convention of 1839 between England and France as to the Channel, and by the North Sea convention of 1882

¹ See Westlake, p. 175.

² A State ne peut s'approprier une chose commune telle que la mer qu'autant qu'il en a besoin pour quelque fin légitime, et d'un autre côté ce serait une prétention vaine et ridicule de s'attribuer un droit que l'on ne serait aucunement en état de faire valoir. Vattel, l. 1, § 289.

between Great Britain, France, Belgium, the Netherlands, Germany and Denmark.

The principle of a presumed limit to occupation was laid down by Bynkershoek, who, taking into account only force exercisable from the shore, taught, first, as a general maxim, *imperium terrae finiri ubi finitur armorum potestas*, and secondly, as the application of that maxim to his own time, the range of cannon, then considered to be 3 sea miles of 60 to a degree of latitude.¹ Hence that distance, measured from low-water mark, became a commonplace among authors for the width of the littoral sea, and we may say that the agreement on it as a minimum is universal: no State claims less. As a maximum the agreement is not universal, and it may be doubted whether it is so nearly such as to make it a rule of international law, while the increased range of cannon-shot, as well as the increased need of protection for shore fisheries against trawl nets and other destructive devices, has made the reason for it quite obsolete and inadequate. The width claimed by Spain is 6 miles, but that claim has been disputed by Great Britain and the United States.² Norway claims 4, and the Institute of International Law in 1894 agreed *nemine contradicente* to recommend 6 miles as the width, after a division in which the proposal of 10 miles, made by M. de Martens, was rejected by 25 votes against 10.³ The nearest approach to an official understanding is to be found in Article 4 of the Suez Canal convention of 1888, which prohibits hostilities within 3 sea miles from the ports at the extremities of the canal, but M. de Freycinet desired a limit better proportioned to the increased range of cannon, and the stipulation is not so expressed as to fix a maximum.⁴ It may be considered that 3 miles is a width lying so far within both the possibility of occupation and the range of the motive that the presumption of occupation and consequent sovereignty to some larger extent could not be denied to any power which had consistently declined to be bound by so narrow a limit. Of course a power which had admitted the 3-mile limit by international engagements could not extend it in its own favor without the consent of the parties to those engagements; and probably a power which without contract had admitted that limit by its internal legislation or by official statements could not extend it, to the detriment of neighbors whom it had allowed to fish up to it, at least until there had been some wide concurrence of States in support of such an extension as already commands the assent of thinkers.

¹ Bynkershoek's argument is in the dissertation *De Domino Maris*, but the maxim, in the terse form quoted in the text, occurs in the *Questiones Juris Publici*, l. 1, c. 8.

² Lord Seabury to Mr. Watson, 25 Dec. 1874, and Mr. Fish in *United States Diplomatic Correspondence*, 1875, p. 641; quoted by Boyd, 3d English edition of Wheaton's *Elements*, p. 271.

³ *Annuaire*, v. 13, p. 290. The rules adopted at this meeting with regard to the territorial sea are on pp. 148-9, *ante*.

⁴ See what is said below on certain fishery limits, *post*, p. 466, note 1.

The area of the land on which a strip of littoral sea is dependent is of no consequence in principle. Guns might be planted on a small island, and we presume that even in practice an island, without reference to its actual means of control over the neighboring water, carries the sovereignty over the same width of the latter all round it as a piece of mainland belonging to the same State would carry.¹ But an extreme case may be put of something which can scarcely be called an island. "If," Sir Charles Russell said when arguing in the Behring Sea arbitration, "a lighthouse is built upon a rock or upon piles driven into the bed of the sea, it becomes as far as that lighthouse is concerned, part of the territory of the nation which has erected it, and, as part of the territory of the nation which has erected it, it has incident to it all the rights that belong to the protection of territory—no more and no less."² It is doubtful from the context whether the eminent advocate meant by this to claim more for the lighthouse in its territorial character than immunity from violation and injury, of course together with the exclusive authority and jurisdiction of its State. It would be difficult to admit that a mere rock and building, incapable of being so armed as really to control the neighboring sea, could be made the source of a presumed occupation of it converting a large tract into territorial water. It might however be fair to claim an exclusive right of fishing so near the spot that, without the light, fishing there would have been too dangerous to be practicable.

The case of the pearl fishery is peculiar, the pearls being obtained from the sea bottom by divers, so that it has a physical connection with the stable element of the locality which is wanting to the pursuit of fish swimming in the water. When carried on under State protection, as that off the British island of Ceylon, or that in the Persian Gulf which is protected by British ships in pursuance of treaties with certain chiefs of the Arabian mainland, it may be regarded as an occupation of the bed of the sea. In that character the pearl fishery will be territorial even though the shallowness of the water may allow it to be practiced beyond the limit which the State in question generally fixes for the littoral sea, as in the case of Ceylon it is practiced beyond the 3-miles limit generally recognized by Great Britain. *Qui doutera, says Vattel, que les pêcheries des perles de Bahrein et de Ceylan ne puissent légitimement tomber en propriété?*³ And the territorial nature of the industry will carry with it, as being necessary for its protection, the territorial character of the sea at the spot.

¹ We have seen that Lord Stowell held the neutrality of the United States to extend 3 miles outward from the mud islands off the coast of the Mississippi.

² 1 Moore's *United States Arbitrations*, 900.

³ L. 1, § 287. See also Sir C. Russell in the Behring Sea arbitration, 1 Moore 901, and Chief Justice Cockburn in *Reg. v. Keyn*, L. R., 2 Exch. D., 199.

As to bays, if the entrance to one of them is not more than twice the width of the littoral sea enjoyed by the country in question—that is, not more than 6 sea miles in the ordinary case, 8 in that of Norway, and so forth—there is no access from the open sea to the bay except through the territorial water of that country, and the inner part of the bay will belong to that country no matter how widely it may expand. The line drawn from shore to shore at the part where, in approaching from the open sea, the width first contracts to that mentioned, will take the place of the line of low water, and the littoral sea belonging to the State will be measured outwards from that line to the distance, 3 miles or more, proper to the State.¹ But although this is the general rule, it often meets with an exception in the case of bays which penetrate deep into the land and are called gulfs. Many of these are recognized by immemorial usage as territorial sea of the States into which they penetrate, notwithstanding that their entrance is wider than the general rule for bays would give as a limit to such appropriation. Examples are the Bay of Conception in Newfoundland, penetrating 40 miles into the land and being 15 miles in average breadth, which is wholly British,² Chesapeake and Delaware Bays, which belong to the United States,³ and the Bay of Cancale, 17 miles wide, which belongs to France. Similar exceptions to those admitted for gulfs were formerly claimed for many comparatively shallow bays of great width, for example those on the coast of England from Orfordness to the North Foreland and from Beachy Head to Dun-nose, which, together with the whole of the Bristol Channel and various other stretches of sea bordering on the British Isles, were claimed under the name of the King's Chambers.⁴ But it is only in the case of a true gulf that the possibility of occupation can be so real as to furnish a valid ground for the assumption of sovereignty, and even in that case the geographical features which may warrant the assumption are too incapable of exact definition to allow of the claim being brought to any other test than that of accepted usage. It is sometimes said and may be historically true that all sovereignty now enjoyed over the littoral sea or certain gulfs is the remnant of

¹ The conventions above referred to (p. 463) relating to the English Channel and the North Sea recognize the exclusive right of fishery to a distance of 3 miles from the low-water mark, and in bays of which the opening from headland to headland does not exceed 10 miles. There is thus an inconsistency between the two limits, no doubt justified by fishery conditions, but detracting from any authority which it might be thought attaches to the conventions in question as helping to determine the limit of the general territorial right either for bays or for a less indented coast line.

² *Direct United States Cable Company Limited v. Anglo-American Telegraph Company Limited*. L.R. 2 Ap. Ca. 394.

³ Wharton's *Digest*, § 28; Taylor, § 229.

⁴ An undefined extent of the upper part of the Bristol Channel is still claimed by Great Britain, and is fairly within the principle of gulfs; *Reg. v. Cunningham*, *Bell's Crown Cases*, 86.

the vast claims which, as we have seen,¹ were once made to sovereignty over the open sea, and which it is held have been gradually reduced to a tolerable measure through such intermediate stages as that of the King's Chambers; and the impossibility of putting the claim to gulfs in a definite general form may be thought favorable to that view. None the less however the rights which are now admitted stand on a basis clear and solid enough to distinguish and support them.

Limits and Nature of the Right in the Littoral Sea and Appropriated Gulfs.

We have described the right enjoyed by a State in its littoral sea and appropriated gulfs as sovereignty, in accordance with the conclusion to which our examination of the possibility of occupation as to the foundation of the right led us. But since it is possible for passing foreigners to enjoy without resulting mischief greater freedom on territorial water than on territorial land, that freedom is established in their favor by rules which cannot be better expressed than in the following portion of the resolutions adopted in 1894 by the Institute of International Law.

ART. 5. All ships without distinction have the right of innocent passage (*passage inoffensif*) through the territorial sea, saving to belligerents the right of regulating such passage and of forbidding it to any ship for the purpose of defense, and saving to neutrals the right of regulating the passage of ships of war of all nationalities through the said sea.

ART. 6. Crimes and offenses committed on board foreign ships passing through the territorial sea by persons on board of them, against persons or things on board the same ships, are as such outside the jurisdiction of the littoral State, unless they involve a violation of the rights or interests of the littoral State or of its subjects² not forming part of the crew or passengers.

ART. 7. Ships which pass through territorial waters must conform to the special regulations published by the littoral State in the interest and for the safety of the navigation or as matter of maritime police.

ART. 8. Ships of all nationalities are subject to the jurisdiction of the littoral State by the simple fact that they are in territorial waters, unless they are only passing through them.

The littoral State has the right to continue on the high seas a pursuit commenced in the territorial sea, and to arrest and judge the ship which has broken its laws within its waters. In case, however, of capture on the high sea, the fact shall be notified without delay to the State of which the ship carries the flag. The pursuit must be interrupted as soon as the ship

¹ The view referred to is that of Hall, § 40.

² *Ressortissants*, which includes persons, if any, over whom jurisdiction is claimed by reason of domicile as well as proper subjects or nationals.

enters the territorial sea of its own country or of a third power. The right to pursue is at an end as soon as the ship has entered a port of its own country or of a third power.

ART. 9. The peculiar situation of ships of war and the ships assimilated to them is reserved.

It is necessary here to guard against an erroneous inference which might be drawn from the doctrine expressed in the above article 7. The right of the littoral State to publish regulations in the interest of navigation does not include a right to exact payment of dues, by ships not entering its harbors, under pretext of providing the navigation with necessary lights and buoys. It has been well said by Dr. Stoerk that—

The institutions provided by littoral States for the benefit of maritime traffic find their compensation, in part directly by harbor dues, light dues and so forth—the context shows that the light dues here mentioned are only those exacted in harbors—in part indirectly in securing and advancing the maritime traffic of their own nationals. Although lighting and buoying a coast is doubtless of great use even to navigation on the high sea, it gives by customary law no claim to the littoral State, not even when the passing ship has crossed the boundary of the littoral water. The development of this doctrine was owing both to the technical difficulties in the way of levying such tolls, and to the operation of reciprocity in distributing the burdens and the benefits of such institutions among all seafaring nations in a fairly equitable manner. The nation which performs its administrative duty as a State by erecting and maintaining these helps to maritime traffic secures to its own subjects, through the modern system of treaties of commerce and navigation, the advantages of the parallel administrative action of all other nations having intercourse with the world. Grotius adhered to the older practice, issuing from a fiscal point of view, when he wrote *quare nec contra jus naturæ aut gentium faciet qui, recepto in se onere tuendæ navigationis juvandæque per ignes nocturnos et brevium signa, vectigal æquum imposuerit navigantibus*: l. 2, c. 3, §14. His commentator, Cocceji, in the spirit of all the old school, agrees with him. But by the end of the eighteenth century levying such dues was already considered as permissible only in such narrow seas as from their dimensions can be regarded as littoral waters.¹

Since the end of the eighteenth century a further progress has been made, and even littoral waters now present no exception to the rule that dues cannot be levied on passing ships without express sanction from treaty, as in the case of the light maintained on Cape Spartel under a treaty between all or most of the maritime States of the

¹ Holtzendorff's *Handbuch des Völkerrechts*, v. 2, p. 494. Stoerk quotes Cocceji as saying: *Princeps enim uti territorium cujus imperium occupavit securum præstare debet, ita et mare. At quia suis sumptibus id facere non tenetur, merito a transeuntibus ideo exigere aliquid potest.* On Grotius, l. c.

world. We shall meet with this principle again in the case of the Sound dues.

The circumstance that the right of the littoral State is limited by the right of innocent passage has led to the question whether, instead of speaking of sovereignty over territorial seas subject to the latter right as a servitude or easement, it would not be more suitable to say that the littoral sea and gulfs are not territorial, though subject to certain rights of the littoral State, which in their turn would thus assume something of the character of servitudes. The Institute of International Law decided by a large majority in favor of the existence of a territorial sea subject to sovereignty, and rightly as we think for several reasons. First, the occupation which is the ground of sovereignty is possible. Secondly, either way certain rights will have to be treated as exceptions to those implied in the terminology adopted, and these can be more simply stated if they consist in innocent passage than if we have to enumerate all the rights reserved to the littoral State. Thirdly, if on any occasion it should be questioned whether the enumeration of the rights to be treated as exceptions to those implied in the terminology is exhaustive, the predominant part in deciding on the new case will be given to the littoral State if it is regarded as sovereign, and this is as for its safety it should be. Fourthly, it would be impossible to doubt the territorial character of ordinary harbors, though not included within low watermark, and these shade insensibly into bays with openings twice the width of the littoral sea, which again, so far as concerns sovereignty, cannot be distinguished in principle from the littoral sea itself. In the case of the *Franconia* (*The Queen v. Keyn*), the judges were divided on the question whether the littoral sea is part of the territory of England, but there were other grounds for denying the court's jurisdiction, and the captain of a foreign ship, who had caused death by negligent navigation within the 3-mile limit, was discharged.¹ Thereupon Parliament, by the Territorial Waters Jurisdiction Act 1878, recited that "the rightful jurisdiction of Her Majesty, her heirs and successors, extends and has always extended over the open seas adjacent to the coasts of the United Kingdom and of all other parts of Her Majesty's dominions to such a distance as is necessary for the defense and security of such dominions," and proceeded to lay down rules of jurisdiction and procedure which we shall have to mention in treating of that subject. This language favors the view that the right is one of sovereignty, and abstains from fixing a maximum width for its zone.

It is necessary here to notice the view of so eminent an authority on international law as Hall, who asserts that "the right of innocent passage does not extend to vessels of war." He argues that "no

¹ L. R., 2 Exch. D., 63.

general interests are necessarily or commonly involved in the possession by a State of a right to navigate the waters of other States with its ships of war. Such a privilege is to the advantage only of the individual State, it may often be injurious to third States, and it may sometimes be dangerous to the proprietors of the waters used."¹ But a ship of war as well as a merchantman may have a lawful errand beyond the littoral sea in question, the importance of which consideration we have seen in the case of international rivers. In the course of its lawful voyage it may be difficult for it to avoid the littoral sea, especially if the width of the latter should receive any general extension. And the possession by the littoral sovereign of a right to interrupt the voyage would expose him, if neutral, to the most inconvenient demands from belligerents for his exercise of that right, while his own safety is sufficiently provided for by the authority to regulate which article 5 of the Institute reserves to him. It would be a very difficult matter for ships of war to take up even a temporary station in foreign, though friendly, territorial waters, and except under stress of weather they do not in fact do so without previously obtaining permission. Indeed even for vessels which are not ships of war the right of innocent passage does not include an unlimited right of anchoring or hovering. Fishermen may not in territorial waters even prepare to fish. If they might do so, an impossible strictness of surveillance would be necessary to prevent their fishing in them.

*Page 203, note to pages 190, 191.*²—The doctrine that pearl fisheries may be regarded as an occupation of the bed of the sea, and in that character are territorial, is discussed by Prof. Oppenheim in an article on "The Channel Tunnel and International Law" in Kohler's *Zeitschrift für Völkerrecht und Bundesstaatsrecht*, 1907, pp. 6–10. His conclusion is that the Ceylon and Bahrein pearl fisheries belong to Great Britain by virtue of unquestioned recognition, but that such recognition is merely a tradition from the times when the freedom of the open sea had not been established. He rejects the acquisition by occupation of any part of the open sea—does not the word "open" beg the question?—and thinks it plain that Vattel did not know that the fisheries in question were beyond usual territorial limits, since he only mentions them as an example under the heading *la mer près des côtes peut être soumise à la propriété*: 1. I, § 287.

We cannot agree in imputing to Vattel a want of the common knowledge about the subjects which he mentions. Limits are not dealt with by him in § 287, and, when he comes to them in § 289, we understand him as allowing the extent of appropriation necessary for the enjoyment of the rights which he has previously admitted. On the legal argument we submit that occupation is a question of

¹ § 42.

² See *ante*, p. 465.

fact, and that the case of common fishing boats, which can succeed one another without offensive mutual obstruction in the use of their lines and nets at the same point of the waters, is different from that of a fishery carried on systematically at a certain point and systematically protected there, that point too being identifiable in the stable bed of the sea. Surely the latter case may amount to occupation, and, when it does so, the legal consequences of occupation must follow.

*Note to page 192.*¹—In *Mortimer v. Peters*, 14 Scots' Law Times, 227. it was considered that the Moray Firth inside a line from Duncansby Head to Rattray Point *might be* territorial water, but the decision was based on the Herring Fishery (Scotland) Act, 1889. That Act, however, might be taken as proving that Parliament held an international right to exist as to the extent of sea for which it legislated.

WHEATON: Elements of International Law. Eighth edition. Edited, with Notes, by Richard Henry Dana, jr. Boston, 1866.

Page 255, § 177.—The maritime territory of every State extends to the ports, harbors, bays, mouths of rivers, and adjacent parts of the sea inclosed by headlands, belonging to the same State. The general usage of nations superadds to this extent of territorial jurisdiction a distance of a marine league, or as far as a cannon-shot will reach from the shore, along all the coasts of the State.²(¹⁰⁵). Within

¹ See *ante*, p. 466.

² [¹⁰⁵ *Territorial Waters*.—Grotius extends territorial rights over as much of the sea as can be defended from the shore. Lib. ii, cap. 3, §§13, 14. The argument is that the limit of exclusive jurisdiction should be the limit of the power of regular and effective instruments of war used on and from the lands and territorial possessions of a nation. Hautefeuille adheres to the rule of the cannon-shot; but contends that in case of small bays and gulfs the line from which the cannon shot should be measured is a line drawn from headland to headland. He does not, however, contend for such a line in case of bays so large as to parts of a public ocean. (*Droits des Nat. Neutr.*, I, 89, 239.) Bynkershoek defines the limits thus: "Terrae potestas finitur, ubi finitur armorum vis, . . . quousque tormenta exploduntur." *De Dominio Maris*, cap. 2. Of the same opinion are Vattel (liv. i, ch. 23, § 289), Azuni (t. i, cap. 2, § 14), Klüber (§ 130), and De Martens (*Droit des Gens*, § 40). Rayneval limits it to the horizon—an impracticable test. (*Instit.* liv. ii, ch. 9, § 10.) Valin contends for a line beyond soundings, "ou l'on ne peut pas trouver le fond." (*Comm. sur l'Ordonnance de 1681*, liv. v, tit. 1.) But soundings are now had at great depths and in many parts of mid-ocean; and there are great irregularities in soundings and differences in coasts in respect of shallowness. Ortolan treats this subject at great length, and comes to the conclusion that the limit (for which he adopts the phrase of Pinheiro Ferreira, *ligne de respect*) should be the extent to which projectiles of war can be effectively thrown from the shore, although that must be an advancing line in the improvements made by modern science. (*Règl. Intern.*, I, ch. 8, p. 152–158, edit. of 1864.) Heffter (*Europ. Völker.*, § 75) adopts the same reasoning, and considers the cannon-shot as the test; and that the treaties which fix upon 3 miles, and formerly fixed upon 2 miles, as the limits, are intended to define the range of artillery. See also Riquelme, *Derecho Pub. Intern.*, I, 253. Jacobson's *Sea Laws*, 586–590. Tellegen, 50. Halleck's *Intern. Law*, 130. Emérigon, *Des Assurances*, ch. 12, § 19. De Cussy, *Droit Marit.*, liv. i, tit. 2, § 40. Wildman's *Intern. Law*, I, 70. The treaties between England and the United States of 1818, and between England and France of 2d August, 1839, settle the limits of exclusive fishery at 3 marine miles. The English act, 1833, assumes the marine league as the limit of jurisdiction over the open sea.]—D.

these limits, its rights of property and territorial jurisdiction are absolute, and exclude those of every other nation.¹

§ 178.—The term “coasts” includes the natural appendages of the territory which rise out of the water, although these islands are not of sufficient firmness to be inhabited or fortified; but it does not properly comprehend all the shoals which form sunken continuations of the land perpetually covered with water. The rule of law in this subject is *Terræ dominium finitur, ubi finitur armorum vis*; and since the introduction of firearms that distance has usually been recognized to be about 3 miles from the shore² (106). In a case before Sir W. Scott (Lord Stowell), respecting the legality of a capture alleged to be made within the neutral territory of the United States, at the mouth of the River Mississippi, a question arose as to what was to be deemed the shore, since there are a number of little mud islands, composed of earth and trees, drifted down by the river, which form a kind of portico to the mainland. It was contended that these were not to be considered as any part of the American territory—that they were a sort of “no man’s land,” not of consistency enough to support the purposes of life, uninhabited, and resorted to only for shooting and taking birds’ nests. It was argued that the line of territory was to be taken only from the Balize, which is a fort raised on made land by the former Spanish possessors. But the learned judge was of a different opinion, and determined that the protection of the territory was to be reckoned from these islands, and that they are the natural appendages of the coast on which they border, and from which, indeed, they were formed. Their elements were derived immediately from the territory; and, on the principle of alluvium and increment, on which so much is to be found in the books of law, *Quod vis fluminis de tuo praedio detraxerit, et vicino praedio attulerit, palam tuum remanet*, even if it had been carried over to an adjoining territory. Whether they were composed of

¹ Grotius, *De Jur. Bel. ac Pac.*, lib. II, cap. 3, § 10; Bynkershoek, *Quaest. Jur. Pub.* lib. I, cap. 8; *De Dominio Maris*, cap. 2; Vattel, liv. I, ch. 23, § 289; Vallin, *Comm. sur l’Ordonnance de la Marine*, liv. V, tit. 1; Azuni, *Dritto Marit*, pt. I, cap. 2, art. 3, § 15; Gallani, *Dei Doveri dei Principi Neutrali in Tempo di Guerra*, liv. I; *Life and Works of Sir L. Jenkins*, vol. II, 780.

² Unde dominium maris proximi non ultra concedimus, quàm e terrâ illi imperari potest, et tamen eò usque; nulla siquidem sit ratio, cur mare, quod in alicujus imperio est et potestate, minus ejusdem es se dicamus, quàm fossam in ejus territorio. . . . Quare omnino videtur rectius, eò potestatem terrae extendi, quousque tormenta exploduntur, eatenus quippe cùm imperare, tum possidere videmur. Loquor autem de his temporibus, quibus illis machinis utimur: alioquin generaliter dicendum esset, potestatem terrae finire, ubi finitur armorum vis; etenim haec, ut diximus, possessionem tuetur. Bynkershoek, *De Dominio Maris*, cap. 2. Ortolan, *Diplomatie de la Mer*, liv. II, ch. 8.

[¹⁰⁶ See note No. 105, *ante*.]—D.

earth or solid rock would not vary the right of dominion, for the right of dominion does not depend upon the texture of the soil ¹(¹⁰⁷).

§ 179.—The exclusive territorial jurisdiction of the British Crown over the inclosed parts of the sea along the coasts of the island of Great Britain, has immemorially extended to those bays called the *King's Chambers*; that is, portions of the sea cut off by lines drawn from one promontory to another. A similar jurisdiction is also asserted by the United States over the Delaware Bay, and other bays and estuaries forming portions of their territory. It appears from Sir Leoline Jenkins that both in the reigns of James I and Charles II the security of British commerce was provided for by express prohibitions against the roving or hovering of foreign ships of war so near the neutral coasts and harbors of Great Britain as to disturb or threaten vessels homeward or outward bound; and that captures by such foreign cruisers, even of their enemies' vessels, would be restored by the Court of Admiralty, if made within the King's Chambers. So, also, the British "Hovering Act," passed in 1736 (9 Geo. II, cap. 35), assumes, for certain revenue purposes, a jurisdiction of 4 leagues from the coasts, by prohibiting foreign goods to be transshipped within that distance, without payment of duties. A similar provision is contained in the revenue laws of the United States; and both these provisions have been declared, by judicial authority in each country, to be consistent with the law and usage of nations ²(¹⁰⁸).

¹ Robinson's *Adm. Rep.* V. 885, (c) *The Anna*.

[¹⁰⁷ See also Halleck's *Intern. Law*, 130. Wildman's *Intern. Law*, I. 39. Ortolan, *Domaine Intern.*, § 93. De Pistoye et Duverdy, *Traité des Prises*, tit. 2, ch. 1, § 1. Islands adjacent to the coast of the mainland, though not formed from it by alluvium or increment, are considered as appurtenant, unless some other power has obtained title to them by some of the recognized modes of acquisition. Halleck's *Intern. Law*, 131. Ortolan, *Règl. Intern.*, liv. II, ch. 8]—D

² Life and Works of Sir L. Jenkins, II, 727, 728, 780. Opinion of the United States Attorney General on the capture of the British ship *Grange* in the Delaware Bay, 1793. Walte's *American State Papers*, I, 75. *The Louis*, Dodson's *Adm. Reports*, II, 245. *Church v. Hubbard*, Cranch, § 281, II, 187. Vattel, *Droit des Gens*, liv. I, ch. 22.

[¹⁰⁸ *Municipal Seizures beyond the Marine League or Cannon-shot*.—The statement in the text requires further consideration. It has been seen that the consent of nations extends the territory of a State to a marine league or cannon-shot from the coast. Acts done within this distance are within the sovereign territory. The war-right of visit and search extends over the whole sea. But it will not be found that any consent of nations can be shown in favor of extending what may be strictly called territoriality, for any purpose whatever, beyond the marine league or cannon shot. Doubtless States have made laws, for revenue purposes, touching acts done beyond territorial waters; but it will not be found that in later times the right to make seizures beyond such waters has been insisted upon against the remonstrance of foreign States or that a clear and unequivocal judicial precedent now stands sustaining such seizures, when the question of jurisdiction has been presented. The revenue laws of the United States, for instance, provide that if a vessel bound to a port in the United States shall, except from necessity, unload

§ 180.—The right of fishing in the waters adjacent to the coasts of any nation, within its territorial limits, belongs exclusively to the subjects of the State. The exercise of this right, between France and Great Britain, was regulated by a Convention concluded between these two powers; in 1839, by the 9th article of which it is provided that French subjects shall enjoy the exclusive right of fishing along the whole extent of the coasts of France, within the distance of 3 geographical miles from the shore, at low-water mark, and that British subjects shall enjoy the same exclusive right along the whole extent of the coasts of the British Islands, within the same distance; it being understood, that upon that part of the coasts of France lying

cargo within 4 leagues of the coast and before coming to the proper port for entry and unloading and receiving permission to do so, the cargo is forfeit, and the master incurs a penalty (Act 2d March, 1797, § 27); but the statute does not authorize a seizure of a foreign vessel when beyond the territorial jurisdiction. The statute may well be construed to mean only that a foreign vessel, coming to an American port and there seized for a violation of revenue regulations committed out of the jurisdiction of the United States, may be confiscated; but that, to complete the forfeiture, it is essential that the vessel shall be bound to and shall come within the territory of the United States, after the prohibited act. The act done beyond the jurisdiction is assumed to be part of an attempt to violate the revenue laws within the jurisdiction. Under the previous sections of that act it is made the duty of revenue officers to board all vessels, for the purpose of examining their papers, within 4 leagues of the coast. If foreign vessels have been boarded and seized on the high sea, and have been adjudged guilty, and their governments have not objected, it is probably either because they were not appealed to or have acquiesced in the particular instance from motives of comity.

The cases cited in the author's note do not necessarily and strictly sustain the position taken in the text. In *The Louis* (Dodson, II, 245), the arrest was held unjustified, because made in time of peace for a violation of municipal law beyond territorial waters. The words of Sir William Scott, on pp. 245 and 246, with reference to the Hovering Acts, are only illustrative of the admitted rule, that neighboring waters are territorial; and he does not say, even as an *obiter dictum*, that the territory for revenue purposes extends beyond that claimed for other purposes. On the contrary, he says that an inquiry for fiscal or defensive purposes, near the coast but beyond the marine league, as under the hovering laws of Great Britain and the United States, "has nothing in common with the right of visitation and search upon the unappropriated parts of the ocean"; and adds, "A recent Swedish claim of examination on the high seas, though confined to foreign ships bound to Swedish ports, and accompanied, in a manner not very consistent or intelligible, with a disclaimer of all right of visitation, was resisted by the British Government, and was finally withdrawn." *Church v. Hubbard* (Cranch, II, 187) was an action on a policy of insurance, in which there was an exception of risks of illicit trade with the Portuguese. The voyage was for such an illicit trade, and the vessel, in pursuance of that purpose, came to anchor within about four leagues of the Portuguese coast; and the master went on shore on business, where he was arrested, and the vessel was afterwards seized at her anchorage and condemned. The owner sought to recover for the condemnation. The court held that it was not necessary for the defendants to prove an illicit trade begun, but only that the risks excluded were incurred by the prosecution of such a voyage. It is true that Chief Justice Marshall admitted the right of a nation to secure itself against intended violations of its laws, by seizures made within reasonable limits, as to which, he said, nations must exercise comity and concession, and the exact extent of which was not settled; and, in the case before the court the four leagues were not treated as rendering the seizure illegal. This remark must now be treated as an unwarranted admission. The result of the decision is that the court did not undertake to pronounce judicially, in a suit on a private contract, that a seizure of an American vessel, made at four leagues by a foreign power, was void and a mere trespass. In the subsequent case of *Rose v. Himely* (Cranch, IV, 241), where a vessel was seized ten leagues from the French coast, and taken to a Spanish port, and condemned in a French tribunal under municipal and not belligerent law, the court held that any seizures for municipal purposes beyond the territory of the sovereign are invalid; assuming, perhaps, that ten leagues must be beyond the territorial limits for all purposes. In *Hudson v. Guestier* (Cranch, IV, 293), where it was agreed that the seizure was municipal

between Cape Carteret and the point of Monga, the exclusive right of French subjects shall only extend to the fishery within the limits mentioned in the first article of the Convention; it being also understood, that the distance of 3 miles, limiting the exclusive right of fishing upon the coasts of the two countries, shall be measured, in respect to bays of which the opening shall not exceed 10 miles, by a straight line drawn from one cape to the other.¹

By the 1st article of the Convention of 1918, between the United States and Great Britain, reciting, that "whereas differences have arisen respecting the liberty claimed by the United States, for the inhabitants thereof to take, dry, and cure fish, on certain coasts, bays, harbors, and creeks, of His Britannic Majesty's dominions in America," it was agreed between the contracting parties, "that the inhabitants of the said United States shall have, forever, in common with the subjects of His Britannic Majesty, the liberty to take fish of every kind on that part of the southern coast of Newfoundland, which extends from Cape Ray to the Rameau Islands, on the western

and was made within a league of the French coast, the majority of the court held that the jurisdiction to make a decree of forfeiture was not lost by the fact that the vessel was never taken into a French port, if possession of her was retained, though in a foreign port. The judgment being set aside and a new trial ordered, the case came up again, and is reported in Cranch, VI, 281. At the new trial the place of seizure was disputed, and the judge instructed the jury that a municipal seizure made within six leagues of the French coast was valid, and gave a good title to the defendant. The jury found a general verdict for the defendant, and exceptions were taken to the instructions. The Supreme Court sustained the verdict—not, however, upon the ground that a municipal seizure made at six leagues from the coast was valid, but on the ground that the French decree of condemnation must be considered as settling the facts involved; and if a seizure within a less distance from shore was necessary to jurisdiction, the decree may have determined the fact accordingly, and the verdict in the Circuit Court did not disclose the opinion of the jury on that point. The judges differed in stating the principle of this case and of *Rose v. Himely*; and the report leaves the difference somewhat obscure.

This subject was discussed incidentally in the case of the *Cagliari*, which was a seizure on the high seas, not for a violation of revenue laws, but on a claim somewhat mixed of piracy and war. In the opinion given by Dr. Twiss to the Sardinian Government in that case, the learned writer refers to what has sometimes been treated as an exceptional right of search and seizure for revenue purposes beyond the marine league; and says that no such exception can be sustained as a right. He adds: "In ordinary cases, indeed, where a merchant ship has been seized on the high seas the sovereign whose flag has been violated waives his privilege, considering the offending ship to have acted with *mala fides* toward the other State with which he is in amity, and to have consequently forfeited any just claim to his protection." He considers the revenue regulations of many States authorizing visit and seizure beyond their waters to be enforceable at the peril of such States and to rest on the express or tacit permission of the States whose vessels may be seized.

It may be said that the principle is settled that municipal seizures can not be made for any purpose beyond territorial waters. It is also settled that the limit of these waters is, in the absence of treaty, the marine league or the cannon-shot. It cannot now be successfully maintained either that municipal visits and search may be made beyond the territorial waters for special purposes or that there are different bounds of that territory for different objects. But as the line of territorial waters, if not fixed, is dependent on the unsettled range of artillery fire, and, if fixed, must be by an arbitrary measure, the courts in the earlier cases were not strict as to standards of distance where no foreign powers intervened in the causes. In later times it is safe to infer that judicial as well as political tribunals will insist on one line of marine territorial jurisdiction for the exercise of force on foreign vessels in time of peace for all purposes alike.]-D.

¹ *Annales Maritimes et Coloniales*, 1839, 1^{re} Partie, p. 861.

and northern coast of Newfoundland, from the said Cape Ray to the Quirpon Islands; on the shores of the Magdalen Islands; and also on the coasts, bays, harbors, and creeks, from Mount Joly, on the southern coast of Labrador, to and through the Straits of Belleisle, and thence northwardly indefinitely along the coast; without prejudice, however, to any of the exclusive rights of the Hudson Bay Company. And that the American fishermen shall also have liberty, forever, to dry and cure fish in any of the unsettled bays, harbors, and creeks, of the southern part of the coast of Newfoundland, here above described, and of the coast of Labrador; but so soon as the same, or any portion thereof, shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such portion so settled, without previous agreement for such purpose with the inhabitants, proprietors, or possessors of the ground. And the United States hereby renounce forever any liberty heretofore enjoyed or claimed by the inhabitants thereof, to take, dry, or cure fish, on or within three marine miles of any of the coasts, bays, creeks, or harbors, of His Britannic Majesty's dominions in America, not included within the above-mentioned limits.⁽¹⁰⁹⁾ Provided, however, that the American fishermen shall be admitted to enter such bays or harbors, for the purpose of shelter, and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever. But they shall be under such restrictions as may be necessary to prevent their taking, drying, or curing fish therein, or in any other manner whatever abusing the privileges hereby reserved to them.¹(¹¹⁰).

§ 181.—Besides those bays, gulfs, straits, mouths of rivers, and estuaries which are inclosed by capes and headlands belonging to the territory of the State, a jurisdiction and right of property over certain other portions of the sea have been claimed by different nations, on the ground of immemorial use. Such, for example, was the sovereignty formerly claimed by the Republic of Venice over the

[¹⁰⁹ It was decided by the mixed commission between the United States and Great Britain under the convention of 1853 that the Bay of Fundy was not a British bay from which United States fishermen were excluded by the convention of 1818, but an open and common sea. . . .]—D.

¹ Elliot's *Diplomatic Code*, I, 281.

[¹¹⁰ The treaty of June 5, 1854, commonly called the Reciprocity Treaty, adjusted the open questions as to rights of fishery between British and American subjects. It gave to citizens of the United States, in addition to their rights under the treaty of 1818, the right to take fish, except shellfish, "on the sea coasts and shores, and in the bays, harbors, and creeks of Canada, New Brunswick, Nova Scotia, and Prince Edward's Island, and of the several islands thereunto adjacent, without being restricted to any distance from the shore," with permission to land for the purpose of drying nets and curing fish. Corresponding rights were given to British subjects to take sea fish and to land and dry nets on the coast of the United States north of latitude 36° N. The treaty did not embrace the salmon and shad fisheries or the fisheries at the mouths of rivers. (U. S. Laws, X, 199.) But this treaty, in accordance with a provision for the purpose, was terminated, after 10 years, by a notice given by the President in pursuance of a resolution of Congress of Jan. 18, 1865. U. S. Laws, XIII, 566.]—D.

Adriatic. The maritime supremacy claimed by Great Britain over what are called the Narrow Seas has generally been asserted merely by requiring certain honors to the British flag in those seas, which have been rendered or refused by other nations, according to circumstances; but the claim itself has never been sanctioned by general acquiescence.¹

Straits are passages communicating from one sea to another. If the navigation of the two seas thus connected is free, the navigation of the channel by which they are connected ought also to be free. Even if such strait be bounded on both sides by the territory of the same sovereign, and is at the same time so narrow as to be commanded by cannon shot from both shores, the exclusive territorial jurisdiction of that sovereign over such strait is controlled by the right of other nations to communicate with the seas thus connected. Such right may, however, be modified by special compact, adopting those regulations which are indispensably necessary to the security of the State whose interior waters thus form the channel of communication between different seas, the navigation of which is free to other nations. Thus the passage of the strait may remain free to the private merchant vessels of those nations having a right to navigate the seas it connects, whilst it is shut to all foreign armed ships in time of peace.

Page 270.—We have already seen that, by the generally approved usage of nations, which forms the basis of international law, the maritime territory of every State extends:

First. To the ports, harbors, bays, mouths of rivers, and adjacent parts of the sea inclosed by headlands belonging to the same State.

Secondly. To the distance of a marine league, or as far as a cannon-shot will reach from the shore, along all the coasts of the State.

Thirdly. To the straits and sounds, bounded on both sides of the territory of the same State, so narrow as to be commanded by cannon-shot from both shores, and communicating from one sea to another.²

§ 188.—The reasons which forbid the assertion of an exclusive proprietary right to the sea in general, will be found inapplicable to the particular portions of that element included in the above designations.

1. Thus, in respect to those portions of the sea which form the ports, harbors, bays, and mouths of rivers of any State where the tide ebbs and flows, its exclusive right of property, as well as sovereignty, in these waters, may well be maintained, consistently with

¹ Vattel, *Droit des Gens*, liv. 1, ch. 23, § 289. Martens, *Précis du Droit des Gens Moderne de l'Europe*, liv. II, ch. 1, § 42. Edinburgh Review, vol. XI, art. 1, pp. 17-19. Wheaton's *Hist. Law of Nations*, 154-157. Klüber, § 132.

² See *supra*, §§ 177-181.

both the reasons above mentioned, as applicable to the sea in general. The State possessing the adjacent territory, by which these waters are partially surrounded and inclosed, has that physical power of constantly acting upon them, and, at the same time, of excluding, at its pleasure, the action of any other State or person, which, as we have already seen, constitutes possession. These waters can not be considered as having been intended by the Creator for the common use of all mankind, any more than the adjacent land, which has already been appropriated by a particular people. Neither the material nor the moral obstacle, to the exercise of the exclusive rights of property and dominion, exists in this case. Consequently the State within whose territorial limits these waters are included, has the right of excluding every other nation from their use. The exercise of this right may be modified by compact, express or implied; but its existence is founded upon the mutual independence of nations, which entitles every State to judge for itself as to the manner in which the right is to be exercised, subject to the equal reciprocal rights of all other States to establish similar regulations, in respect to their own waters.

§ 189.—2. It may, perhaps, be thought that these considerations do not apply, with the same force, to those portions of the sea which wash the coasts of any particular State, within the distance of a marine league, or as far as a cannon-shot will reach from the shore. The physical power of exercising an exclusive property and jurisdiction, and of excluding the action of other nations within these limits, exists to a certain degree; but the moral power may, perhaps, seem to extend no further than to exclude the action of other nations to the injury of the State by which this right is claimed. It is upon this ground that is founded the acknowledged immunity of a neutral State from the exercise of acts of hostility, by one belligerent power against another, within those limits. This claim has, however, been sometimes extended to exclude other nations from the innocent use of the waters washing the shores of a particular State, in peace and in war; as, for example, for the purpose of participating in the fishery, which is generally appropriated to the subjects of the State within that distance of the coasts. This exclusive claim is sanctioned both by usage and convention, and must be considered as forming a part of the positive law of nations.¹

§ 190.—3. As to straits and sounds, bounded on both sides by the territory of the same State, so narrow as to be commanded by cannon-shot from both shores, and communicating from one sea to another,

¹ Martens, *Précis du Droit des Gens Moderne de l'Europe*, § 153. "Mais si loin de s'en emparer, il a une fois reconnu le droit commun des autres peuples d'y venir pêcher, il ne peut plus les en exclure; il a laissé cette pêche dans sa communion primitive, au moins à l'égard de ceux qui sont en possession d'en profiter." Vattel, *Droit des Gens*, liv. i, ch. 23, § 287.

we have already seen that the territorial sovereignty may be limited, by the right of other nations to navigate the seas thus connected. The physical power which the State, bordering on both sides the sound or strait, has of appropriating its waters, and of excluding other nations from their use, is here encountered by the moral obstacle arising from the right of other nations to communicate with each other. If the Straits of Gibraltar, for example, were bounded on both sides by the possessions of the same nation, and if they were sufficiently narrow to be commanded by cannon-shot from both shores, this passage would not be the less freely open to all nations; since the navigation, both of the Atlantic Ocean and the Mediterranean Sea, is free to all. Thus it has already been stated that the navigation of the Dardanelles and the Bosphorus, by which the Mediterranean and Black Seas are connected together, is free to all nations, subject to those regulations which are indispensably necessary for the security of the Ottoman Empire. In the negotiations which preceded the signature of the treaty of intervention, of the 15th of July, 1840, it was proposed, on the part of Russia that an article should be inserted in the treaty, recognizing the permanent rule of the Ottoman Empire; that, whilst that empire is at peace, the Straits, both of the Bosphorus and the Dardanelles, are considered as shut against the ships of war of all nations. To this proposition it was replied, on the part of the British government, that its opinion respecting the navigation of these Straits by the ships of war of foreign nations rested upon a general and fundamental principle of international law. Every State is considered as having territorial jurisdiction over the sea which washes its shores, as far as 3 miles from low-water mark; and, consequently, any strait which is bounded on both sides by the territory of the same sovereign, and which is not more than 6 miles wide, lies within the territorial jurisdiction of that sovereign. But the Bosphorus and Dardanelles are bounded on both sides by the territory of the Sultan, and are in most parts less than 6 miles wide; consequently his territorial jurisdiction extends over both those Straits, and he has a right to exclude all foreign ships of war from those Straits, if he should think proper so to do. By the treaty of 1809, Great Britain acknowledged this right on the part of the Sultan, and promised to acquiesce in the enforcement of it; and it was but just that Russia should take the same engagement. The British Government was of opinion, that the exclusion of all foreign ships of war from the two Straits would be more conducive to the maintenance of peace, than an understanding that the Strait in question should be a general thoroughfare, open, at all times, to ships of war of all countries; but whilst it was willing to acknowledge by treaty, as a general principle and as a standing rule, that the two Straits should be closed for all ships of war, it

was of opinion, that if, for a particular emergency, one of those Straits should be open for one party, the other ought, at the same time, to be open for other parties, in order that there should be the same parity between the condition of the two Straits, when open and shut; and, therefore, the British Government would expect that, in that part of the proposed Convention which should allot to each power its appropriate share of the measures of execution, it should be stipulated, that if it should become necessary for a Russian force to enter the Bosphorus, a British force should, at the same time, enter the Dardanelles.

§ 191.—It was accordingly declared, in the 4th article of the convention, that the cooperation destined to place the Straits of the Dardanelles and the Bosphorus and the Ottoman capital under the temporary safeguard of the contracting parties, against all aggression of Mehemet Ali, should be considered only as a measure of exception, adopted at the express request of the Sultan, and solely for his defense, in the single case above mentioned; but it was agreed that such measure should not derogate, in any degree, from the ancient rule of the Ottoman Empire, in virtue of which it had, at all times, been prohibited for ships of war of foreign powers to enter those Straits. And the Sultan, on the one hand, declared that, excepting the contingency above mentioned, it was his firm resolution to maintain, in future, this principle invariably established as the ancient rule of his Empire, and, so long as the Porte should be at peace, to admit no foreign ship of war into these Straits; on the other hand, the four powers engaged to respect this determination, and to conform to the above-mentioned principle.

This rule, and the engagement to respect it, as we have already seen, were subsequently incorporated into the treaty of the 13th July, 1841, between the five great European powers and the Ottoman Porte; and as the right of the private merchant vessels of all nations, in amity with the Porte, to navigate the interior waters of the Empire which connect the Mediterranean and Black Seas, was recognized by the treaty of Adrianople, in 1829, between Russia and the Porte; the two principles—the one excluding foreign ships of war, and the other admitting foreign merchant vessels to navigate those waters—may be considered as permanently incorporated into the public law of Europe.¹ . . .

§ 193.—Things of which the use is inexhaustible, such as the sea and running water, can not be so appropriated as to exclude others from using these elements in any manner which does not occasion a loss or inconvenience to the proprietor. This is what is called an *innocent use*. Thus we have seen that the jurisdiction possessed by one nation over sounds, straits, and other arms of the sea, leading

¹ Wheaton's *Hist. Law of Nations*, 577–583.

through its own territory to that of another, or to other seas common to all nations, does not exclude others from the right of innocent passage through these communications. The same principle is applicable to rivers flowing from one State through the territory of another into the sea, or into the territory of a third State. The right of navigating, for commercial purposes, a river which flows through the territories of different States, is common to all the nations inhabiting the different parts of its banks; but this right of innocent passage being what the text-writers call an *imperfect right*, its exercise is necessarily modified by the safety and convenience of the State affected by it, and can only be effectually secured by mutual convention regulating the mode of its exercise.¹

Page 529, § 432.—When the maritime war commenced in Europe, in 1793, the American Government, which had determined to remain neutral, found it necessary to define the extent of the line of territorial protection claimed by the United States on their coasts, for the purpose of giving effect to their neutral rights and duties. It was stated on this occasion, that governments and writers on public law had been much divided in opinion as to the distance from the sea-coast within which a neutral nation might reasonably claim a right to prohibit the exercise of hostilities. The character of the coast of the United States, remarkable in considerable parts of it for admitting no vessel of size to pass near the shore, it was thought would entitle them in reason to as broad a margin of protected navigation as any nation whatever. The government, however, did not propose, at that time, and without amicable communications with the foreign powers interested in that navigation, to fix on the distance to which they might ultimately insist on the right of protection. President Washington gave instructions to the executive officers to consider it as restrained, for the present, to the distance of *one sea league*, or *3 geographical miles*, from the seashores. This distance, it was supposed, could admit of no opposition, being recognized by treaties between the United States, and some of the powers with whom they were connected in commercial intercourse, and not being more extensive than was claimed by any of them on their own coasts. . . .

¹ Grotius, *De Jur. Bel. ac Pac.*, lib. II, cap. 2, §§ 12–14; cap. 3, §§ 7–12. Vattel, *Droit des Gens*, liv. II, ch. 9, §§ 126–130; ch. 10, §§ 132–134. Pufendorf, *De Jur. Naturae et Gentium*, lib. III, cap. 3, §§ 3–6.

PART II.
OFFICIAL PAPERS AND DOCUMENTS.

POLYNATIONAL.

1874.—*Declaration by Spain, the United States, Germany, Austria, Italy, Denmark, Holland, and Belgium that if the limit of the territorial sea should be determined by an international agreement three sea leagues should be the minimum.*¹

1881, October 10.—*Excerpt from the proceedings of the Conference held at The Hague October 8-29, 1881, and May 4-6, 1882, to formulate regulations for the police of the North Sea fisheries.*²

The principle of the existence of a territorial sea is admitted.

The president puts the question of defining it by miles or by kilometers.

The French delegates prefer miles, a measure more in conformity with naval usage.

It is agreed to retain the definition by geographical miles, of sixty to a degree, as in the draft of the Anglo-French Convention of 1867.

In regard to the determination of the territorial limits in bays, the French delegates are agreed that the rules contained in the draft of the convention on this subject should not be applied to the North Sea, for these rules apply exclusively to oysters, which are not found in the North Sea.

They propose to adopt the *three geographic miles*, which should follow the configuration of the coast and to extend from the low-water mark.

The German delegates raise objections concerning the mouth of the Elbe, which portion of the sea is exclusively German.

The English delegates made similar observations.

The president proposed to make an exception in this respect and to insert a clause formulated as follows: "that the police outside the territorial seas shall not enforce laws which might have pertinence to special States," or, indeed, "that the bays shall continue to belong to the State which has owned them."

The delegate from Norway, Mr. E. Bretteville, could not accept the determination of territorial limits at three miles, especially as pertaining to bays; he maintained also that the international police should only enforce laws which might have pertinence to special States, and that the bays should continue to be under the jurisdiction of the State to which they belong at present.

¹ See Schücking, *ante*, p. 427.

² Translation. For the French text, see Martens, *Nouveau recueil de traités*, 2d series, vol. 9, p. 510.

The Belgian delegate, Mr. Orban, proposes that the Convention do not define the territorial sea, whereupon M. Rahusen objects, presenting the difficulties which would arise from such limitation for the cruisers of the various nations charged with the police duties.

The English delegates are agreed that the question of the bays constitutes a question of principle and that for the present they are unable to agree as to an expression of an opinion in this matter.

Upon their proposal, the question is reserved for a future meeting.

The French delegates finally formulated their opinion in the following manner: "In the North Sea the limit of the region called the territorial sea is fixed following the configuration of the land at *three miles* from low-water mark, along the coasts of . . .

"It is finally agreed that no modification should be made of the laws concerning the various border States as to certain parts of the coast," or indeed: "It is finally agreed that the present Convention modify in no manner the laws which a Government has made regarding the bays outside the *three-mile* limit."

1882, May 6.—*Convention between Great Britain, Germany, Belgium, Denmark, France, and the Netherlands, for regulating the police of the North Sea fisheries.—Signed at The Hague.*¹

ARTICLE 2. The fishermen of each country shall enjoy the exclusive right of fishery within the distance of *3 miles* from low-water mark along the whole extent of the coasts of their respective countries, as well as of the dependent islands and banks.

As regards bays, the distance of *3 miles* shall be measured from a straight line drawn across the bay in the part nearest the entrance, at the first point where the width does not exceed 10 miles. . . .

ARTICLE 3. The miles mentioned in the preceding article are geographical miles whereof sixty make a degree of latitude.

1885, March 7.—*Protocol between Great Britain, Germany, and Spain, respecting the sovereignty of Spain over the Sulu Archipelago.*²

ARTICLE 3. The Spanish Government renounces, as far as regards the British Government, all claims of sovereignty over the territories of the continent of Borneo, which belong, or which have belonged in the past to the Sultan of Sulu (Joló), and which comprise the neighboring islands of Balambangan, Banguay, Malawali, as well as all those comprised within a zone of *three maritime leagues*

¹ *Foreign Relations of the United States*, 1887, p. 439.

² Translation. Hertslet, *Commercial Treaties*, vol. 17, p. 1017.

from the coast, and which form part of the territories administered by the company styled the "British North Borneo Company."

1888, October 29.—Convention between Great Britain, Austria-Hungary, France, Germany, Italy, the Netherlands, Russia, Spain, and Turkey, respecting the free navigation of the Suez Maritime Canal.—Signed at Constantinople.¹

4. The Maritime Canal remaining open in time of war as a free passage, even to the ships of war of belligerents, according to the terms of Article 1 of the present Treaty, the High Contracting Parties agree that no right of war, no act of hostility, nor any act having for its object to obstruct the free navigation of the Canal, shall be committed in the Canal and its ports of access, as well as within a radius of *three marine miles* from those ports, even though the Ottoman Empire should be one of the belligerent Powers.

1907, September 17.—Report to the Third Commission of the Second Hague Peace Conference.²

In Articles 2 to 5 the regulations proceed to determine the places where anchored automatic contact mines may be laid—Articles 2 and 3 have reference to placing such mines as a defense for coasts; Article 4 relates to attack, that is, to the anchored mines that the belligerent places before the coasts of his adversary; Article 5 deals with the possibility of making use of anchored mines even beyond such limits, in the sphere of the immediate activity of the belligerents.

Indeed, if a limitation as to area of the use of unanchored automatic contact mines would not sensibly reduce the dangers they present, and if to realize this aim we had to have recourse to the prohibition in paragraph 1 of Article 1, for anchored automatic contact mines such a limitation as to area seems necessary from several points of view. Anchored mines concealed in the water and intended to serve for a long time constitute a permanent danger for ships assuming risks in the regions where they have been placed; it would therefore be necessary to forbid their use where peaceful shipping has the right to move freely. Nevertheless, here again the principle of the

¹ Hertslet, *Commercial Treaties*, vol. 18, p. 370.

² Scott, *Reports to the Hague Conference of 1899 and 1907*, p. 661. The eighth convention concluded at the Second Hague Peace Conference relative to the laying of automatic submarine contact mines contains no provisions regarding the extent of the marginal sea. However, the draft convention prepared by the committee of examination and submitted to the Third Commission contained articles on the subject of the width of the marginal zone in which the laying of mines is permissible. The discussions in which these articles were evolved are summarized in the above report submitted to the Commission.

free use of the sea is in opposition with the inflexible necessities of national defense or of war, and a compromise again seems needful

Considerations of this kind had led the Institute of International Law¹ to desire to prohibit the laying of mines on the high seas while permitting belligerents to lay them in their own waters as well as in the waters of their adversaries, and leaving to neutrals the option of laying mines in their own waters to prevent the violation of neutrality. It is this same idea that inspired the original proposition, in which a very clear distinction was made in the same sense between the high seas and territorial waters. A single exception to this rule was contained in the British proposition: The zone of coastal waters—and in this report we thus term waters washing the coasts of a State without reference to limit—in which the laying of anchored mines was not prohibited, “could be extended up to a distance of ten miles before fortified war ports, with the responsibility, nevertheless, for the belligerent which places mines to give notice thereof to neutrals and to take the steps that circumstances permit in order to prevent, so far as possible, merchant ships that could not have received this notice from being exposed to destruction.”

After a thorough discussion the committee, while taking as a general point of departure the distinction between coastal waters and the sea beyond these limits, decided to fix upon a distance from the coast beyond which the use of anchored mines would only be permitted under certain restricted conditions (Article 5). These conditions would not apply to anchored mines placed with the distance fixed (Articles 2–4).

On the other hand, after long deliberation, a provision advanced at the beginning of the debate by the delegation of the Netherlands was rejected. Among the original Netherland proposals was one establishing a prohibition “to bar straits uniting two open seas.” In a formula presented later the sense of this prohibition was thus specified: “In any case,” read the formula presented to the committee of examination, “the communication between two open seas can not be barred entirely, but passage will be permitted only on conditions which are indicated by the competent authorities.”

His Excellency Vice Admiral Röell explained to the subcommission that the proposal had reference only to the right which should be reserved to neutrals to traverse straits uniting two high seas, straits which ought not to be entirely barred. He pointed out that, except where special conventions govern the situation of certain straits, no one in theory contested the obligation to allow passage through straits joining two open seas; but it is important that this principle be fixed by a conventional stipulation clearly stating that straits can not be barred so as not to leave open communication for peaceful shipping.

¹ Scott, *Resolutions of the Institute of International Law* (New York, 1916), p. 166.

It would be well understood that the bordering State might lay down conditions for passage, especially by having the ships that wish to pass guided by a pilot. In speaking of straits joining two open seas all the interior seas of a State would naturally be excluded. "A rule," concluded the Vice Admiral, "is necessary. If we do not formulate one the situation will be untenable, and the absence of any stipulation will give rise to complaints and disputes, which from every point of view we must try to avoid."

In order to bring out the sense of the prohibition clearly there was added, after a preliminary exchange of views in the committee, to the rules proposed by the delegation of the Netherlands a second paragraph stating that "these provisions have no effect upon rules established by existing treaties nor upon rights of territorial sovereignty."

In fact, notwithstanding the explanations given, the proposal of the Netherlands met objections drawn from rights of territorial sovereignty as well as from conventional stipulations existing on the subject of certain straits. It would be necessary, it was said, that these reservations appear in the very text of the arrangement in order to cover the declarations made on several sides on the subject of existing conventional stipulations, as well as on the subject of straits whose shores belong to the same State. The declaration made in the name of the delegation of Japan at one of the sessions of the sub-commission was recalled. His Excellency, Mr. Tsudzuki, while declaring that he had no objection if the rule were applied only to neutral countries, had remarked, on behalf of the delegation of Japan, that "the Netherland amendment to Article 4 of the British proposal could, in his opinion, perhaps be adapted to the geographical conditions of continental States but not always to those of insular Powers. By reason of the particular configuration of Japan, of the great number of straits separating the islands (straits which are an integral part of its territory, but which, nevertheless, would fall within the definition as written in the said amendment), the Japanese delegation could not adhere to this provision."

However, even with the above-stated addition, the proposed formula concerning straits did not carry. A declaration worded more broadly, so as to include also the laying of mines in straits by neutrals, was made in the committee on behalf of the Japanese delegation by Rear Admiral Shimamura; but this delegation at the same time added that it would be improbable that the straits between Japanese islands would ever be entirely barred to neutral navigation, and he said that he was ready to accept a provision to the effect that—

It is desirable that communication between two open seas be not entirely barred by automatic mines. Nevertheless, passage may be subjected to conditions to be decreed by the competent authorities.

Rear Admiral Sperry declared in the name of the delegation of the United States that "taking into consideration the great number of islands composing the Philippine group and the uncertainty of the results that the stipulation in question might have, and also taking into account the stipulations of treaties comprised within the added paragraph, it could not take part in the discussion, since, in its opinion, the matter was outside the scope of its instructions."

Finally, in a declaration made on behalf of the Ottoman delegation, his Excellency Turkhan Pasha stated that—

The Imperial Ottoman delegation believes that it should declare that, given the exceptional situation created by treaties in force of the straits of the Dardanelles and the Bosphorus (straits which are an integral part of the territory), the Imperial Government could not in any way subscribe to any undertaking tending to limit the means of defence that it may deem necessary to employ for these straits in case of war or with the aim of causing its neutrality to be respected.

To these reservations were added doubts respecting the legal meaning of the formula as stated; it was asked what straits were contemplated by it as uniting two open seas, and up to what point would the rights of territorial sovereignty exclude an application of the principle.

Finally the delegation of Germany and Spain declared themselves without instructions on the subject of the whole provision, and the delegation of Russia expressed reservations as to the competence of the Conference to deal with this matter. According to a declaration made by Captain Behr on behalf of the Imperial delegation—

The article in question establishes a general status for all straits.

The delegation of Russia thinks that as the status of certain straits is regulated by special treaties based upon political considerations, the stipulations concerning these straits can not form the subject of discussion. As to creating a special status for one class of straits and excepting others, this procedure would seem fruitless and very dangerous. The difference in status resulting therefrom, both for neutrals and for belligerents, would inevitably be a new source of conflicts between them.

I am consequently directed by my delegation to declare that, in its opinion, the question of the status of straits joining two open seas is not within the competence of the Conference, and that the Imperial delegation can not take part in discussing any proposals relative thereto.

Owing to these reservations and declarations the committee unanimously decided to omit any provision concerning straits, which should remain unaffected by any stipulation in the present regulations; it was distinctly laid down that by the stipulations of the Con-

vention to be concluded no change whatever is made in the present status of straits, which is in nowise affected by the provisions on the use of mines.

VI.

It is within these limits that the text decided upon by the committee restricts in Articles 2 to 5 the places where anchored automatic contact mines may be placed.

ARTICLE 2.

It is forbidden to lay anchored automatic contact mines, beyond a distance of *three nautical miles* from low-water mark, throughout the length of the coast-line, as well as along the islands and islets adjacent thereto.

In the case of bays, the zone of *three nautical miles* shall be measured, starting from a straight line drawn across the bay in its part nearest the entrance at the first point where the opening does not exceed *ten miles* in width.

The committee naturally had some hesitation when considering the substitution of the limit of *three marine miles* for the limit of territorial waters contained in the original British proposal. The question of knowing whether, in order to avoid controversy and different opinions as to the extent of territorial waters, it would not be better to fix a limit for the purposes of the present regulations, was brought up in the subcommission by his Excellency Mr. van den Heuvel. As the British delegation had no objection to such a determination and had itself suggested the distance of *three miles*, the committee was left to find a formula to this effect which should take into account the limits necessitated by the sinuosities of the coasts and the islands and islets belonging to States. It was, however, clearly established that such a determination could only relate to the laying of mines, without carrying in any manner whatever a definition of territorial waters which could have application and legal consequences in other matters.

In the committee the question had to be gone into again, as some of the members were opposed to the substitution of any fixed limit to the extent of "territorial waters." It was observed that the right of laying mines should extend as far as the jurisdiction of the bordering State, and that especially for the defence of the country, in view of the possibility of bombardments directed against the shore by enemy naval forces, the limit for anchored mines should not be less than gun range. Rear Admiral Sperry, on behalf of the delegation of the United States of America, declared that even a limitation on the basis of territorial waters could not be considered as sufficient in every circumstance. This is why the American proposal had avoided mentioning any limit on area.

The omission (said he) in the proposal of the delegation of the United States of America relative to submarine mines of a definite restriction on the places where they may be laid is not due to any sympathy whatever with the general use of mines beyond territorial waters, a means which in common with the whole civilized world it condemns, but for quite other considerations.

The term territorial waters is perhaps no more certain in its application than measured limits; but the naval delegate of the United States is not prepared to say that a limitation in one way or another would not affect the right to defend the four thousand miles of continental coast of the United States at certain points which must be approached through a winding channel between submerged reefs, far from the shore, where some mines would absolutely prevent access. In one island of the Philippines that is surrounded by reefs there is a large bay with land on all sides, which would shelter the fleet of the greatest Power.

The Powers that are here represented have vast rich possessions in the Pacific and Indian Oceans, where the harbours and islands are protected by coral reef barriers, with only here and there a passage that may or may not be less than ten or even a hundred miles from the mainland.

The reefs may or may not be exposed at low tide. Where is the low-water mark? Has it been decided that all waters inside of reefs are territorial waters? Shall the *three miles* be measured from the reefs and beyond? The coast of Australia is fringed for more than a thousand miles by the Great Barrier Reef at a distance of from twenty to one hundred and fifty miles from the shore. Inside this reef, where there is only an occasional passage, there exists a labyrinth of lesser reefs and islets, but in the thousand miles the largest vessels can navigate in security under the guidance of a pilot. It is not necessary for a ship going to an Australian port to pass inside, and the interior waters can hardly be considered as forming a part of the high seas. It is not within the knowledge of the delegate of the United States whether they are so considered; but it seems doubtful that the nationals of that great and rich community would voluntarily abandon what might be almost a perfect defence of important points.

Many Powers represented here have vast colonial empires whose coasts are protected by almost perfect ramparts of coral, as all naval officers know, and it would be well to consider with care the possible effects of any conventional provision that we might agree upon, and that when once made would be difficult to denounce.

To these considerations it was objected that if we followed out all the logical consequences we should be led to omit any limitation as to area on the laying of anchored mines, which would not appear to correspond to the intentions of the American proposal; on the other hand, this proposal itself would have provided for the neces-

sity of taking precautions for the security of neutrals, and this, by implying the obligation to give notice of the places mined, would appear to deprive these arguments of much of their force.

The committee held to the distinction in principle between coastal waters and the high seas; it decided, moreover, by a majority of votes (nine to five, with two abstentions) to fix the limit at *three marine miles* from the coast. In conformity with the suggestions of the subcommission, the committee, on the motion of his Excellency Vice Admiral Röell, as a means of designating the line to mark the limit within which the laying of anchored mines is lawful, adopted a formula almost identical with that which appears in Article 2 of the Convention on fisheries in the North Sea, dated May 6, 1882. The only change made in this formula was the substitution in paragraph 1 of the word "islets" for "banks," which is found in the 1882 Convention. Captain Ottley drew the attention of the committee to the discussions to which the use of the word "banks" might give rise if borrowed from the above-mentioned Convention. "At the mouths of great rivers, and indeed everywhere in the world," said he, "are found reefs and sand banks at a distance much greater than *three miles* from the coast; if we do not render the text more precise by omitting any mention of banks, it will be possible to extend the application of Article 2 to those banks and those reefs that are entirely or partly submerged, and the principle adopted that prohibits as a general rule the laying down of mines beyond coastal waters might be imperilled."

The committee, notwithstanding the explanation given by his Excellency Vice Admiral Röell, and according to which the term "banks" was clear enough, comprising islets at low tide, that is to say, banks that are dry at low water, preferred to select a less equivocal term, and by a minority of votes (seven against four, with six abstentions) supported the opinion of his Excellency Mr. Hammar skjöld, who proposed to substitute for the word "banks" the word "islets," which appears in our text.

A reservation was formulated by the Ottoman delegation on the subject of paragraph 2 of Article 2. His Excellency Turkhan Pasha declared that the limitation indicated as to bays in the said paragraph did not appear to him sufficiently to take into account all geographical circumstances.

ARTICLE 3.

The limit for the laying of anchored automatic contact mines is extended to a distance of *ten nautical miles* off military ports and ports where there are either military arsenals or establishments of naval construction or repair.

As military ports are considered those ports which have been decreed as such by the nation to which they belong.

It will be recalled that a provision fixing a greater distance before fortified naval ports was already contained in the British proposal. This same proposal defined naval ports, stating expressly that as such should be considered "only ports possessing at least a large graving dock and provided with the outfit necessary for the construction and repair of warships, if a staff of workmen paid by the State is maintained there in time of peace for this purpose."

On this principle itself, of fixing a wider zone before naval ports, there appeared to be agreement; the only objection was that any words on this point might seem superfluous in view of the possibility of placing anchored mines in the theater of war. But there was some hesitation as to the distance to be fixed; on the vote there were eight votes in favour of the distance of *ten miles*, five in favour of *six miles*, and three abstentions.

On the other hand, there was more difficulty in getting an agreement respecting the places before which this wider zone would be permitted. The definition of a naval port contained in the British project seemed too narrow. The delegation of the Netherlands called the attention of the subcommission to the fact that graving docks and stocks for construction or repairs are often located in an interior commercial port which the fortified port serves as a seaport. It expressed doubts on the utility or necessity of requiring that the yards in question be operated by the State. In this sense his Excellency Vice Admiral Röell submitted an amendment, whereby it was left to each State to determine which of its ports should be considered as naval ports. His Excellency Count Tornielli observed that there is a connection between this question and the regulations adopted by the Conference for bombardment of undefended towns and ports by naval forces. If, according to these regulations, military arsenals and naval shipyards, even when belonging to individuals and located in undefended coast towns, are exposed to destruction by cannon fire by means of bombardment from the sea, it will be quite necessary to allow a State to defend its shipyards by placing mines so as to shelter them from bombardment by hostile naval forces; that is to say, that it is necessary to widen the zone for laying mines to *ten marine miles* before these places. Therefore for this purpose the places where military arsenals or naval shipyards or graving docks exist are to be classed with naval ports.

Against these arguments Captain Ottley insisted, in the name of the British delegation, on the necessity of not extending the zone of *ten miles* to that degree; at least it would be necessary not to be able to place mines to such a distance before *every* hostile place where naval shipyards are located. He concluded by asking for the omission of these words in paragraph 1 of Article 3, and supported his amendment as follows:

If we keep the words "and those where there are naval shipyards" in the text of the Convention, it will be permissible for the belligerent to sow mines in profusion on the open sea up to a distance of *ten miles* around a large number of ports of a character quite commercial belonging to the enemy under the pretext that such ports possess "naval shipyards." We might cite as examples the ports of Marseille, Belfast, Liverpool, Seattle, Philadelphia, Havre, St. Nazaire, Bordeaux, Danzig, Bremerhaven, Leghorn, Sestri Ponente, Odessa, Nikolayev, Helsingfors, Rotterdam, and hundreds of other centres of industry. The result of such operations will be ruinous, and besides, such a rule will violate the principle for which the large majority of the committee has already voted. That is to say, that as far as possible the use of these engines on the open sea should be restricted.

Therefore, I propose to omit the words "and those where there are naval shipyards."

In fact, it seems to me that we are so occupied with the desire to accord the greatest liberty of action to a country wishing to *defend* its coasts and harbours by means of automatic mines, that we are risking enlarging in an extremely dangerous way the right of a belligerent to sow these mines in profusion before the commercial ports of his *adversary*. There can be no reasonable objection to the use of mines as a means of *defense* of a port, since the defender will always be in the neighbourhood to watch over the dangerous region in front of his own ports. Besides, it is a fundamental principle of international law that the sovereignty of a State with respect to defence and internal police is never hindered. But no such consideration can be advanced with respect to the other side of the question, that is to say, the unlimited placing of mines before the port of an *enemy*. This operation will always constitute a very serious danger for neutral vessels since an enemy can not possibly watch over these mines effectively.

Let us take a concrete example. A vessel carrying mines could arrive after nightfall at the mouth of a great river—the Garonne, Plata, Seine, Mississippi, Thames, or the Rhine. Before sunrise the next day it could sow five hundred mines. The mines having been placed during the night the vessel laying them can not with certainty determine the points where they are.

If we do not omit the above-mentioned words this terrible operation may take place not only within the *three-mile limit* but even at a distance of *ten miles* from the coast. The belligerent vessel will justify itself for this action by declaring that there exists in some port situated on the river a "naval shipyard," and that consequently international law grants it the right to act thus.

As is seen, the considerations presented by the British delegation had reference to attack; the reasons adduced by his Excellency Count Tornielli in advocating the extension of the zone of *ten miles* to any place where naval shipyards are found had regard mainly to defense.

Harmony appeared to be obtained by establishing a distinction between attack and defense. On motion of Commandant Castiglia the majority of the committee decided (see the commentary on the next article) that while preserving in the text of Article 3, which contemplated only defense, the more general terms of the formula presented by the Italian delegation, the rights of the assailants would be limited in Article 4 by not permitting him to place mines at a distance of *ten miles* before enemy ports (not constituting, of course, naval ports) unless they contained naval shipyards *belonging to the State*.

Thus the text of Article 3 as it appears in the project secured unanimity, with the reservation by the majority of the committee that its scope be restricted in the next article with respect to laying anchored mines for the purposes of attack.

ARTICLE 4.

Off the coast and ports of their adversaries the belligerents may lay anchored automatic contact mines within the limits indicated in the two preceding articles.

However, they shall not exceed the limit of *three nautical miles* off ports which are not military ports, unless establishments of naval construction or repair belonging to the State are situated therein.

It is forbidden to lay automatic contact mines off the coasts and ports of the enemy with the sole object of intercepting commercial shipping.

After having fixed limits for the defense of coasts the regulations take up attack in Article 4. The first two paragraphs of this article deal with the limits of area that belligerents must observe in laying anchored mines before enemy coasts; the third paragraph adds a new restriction, which is that, even where anchored mines may be placed before enemy coasts in the zone referred to in the first two paragraphs, they can not be placed there "with the sole object of intercepting commerce."

1. Let us first take up this last provision. It owes its existence to a British proposal contained in the first project of the delegation of Great Britain, and stating that "it is forbidden to use automatic submarine contact mines to establish or maintain a commercial blockade."

In the subcommission Rear Admiral Arago remarked that it would be, above all, necessary to determine the precise scope of this provision. "Does it, for example, forbid belligerent vessels which are establishing a blockade all use of submarine mines even for their own defense, or, on the contrary, is its only purpose to forbid the establishment of a blockade by the aid of a cordon of submarine mines placed before an enemy coast?" To this Captain Ottley answered "that the

thought underlying this provision was the prohibition of a belligerent from closing a commercial port of his enemy through the employment of automatic contact mines."

This being the case, it was questioned whether the discussion of the British proposal did not fall outside the competence of the Third Commission. It was remarked that the question of to what extent and in what manner a blockade may be established is one for the Fourth Commission, which was dealing with the subject of blockade in war;—it pertains especially to the Fourth Commission to give an expression on any question concerning the effectiveness of blockade. After an interchange of views in the subcommission the president was able to announce the unanimous decision of the subcommission to deal with only one of the phases of the British proposal; it would only determine, in its examination of mines as a means of injuring the enemy, whether use may be made of them with the object of barring the commercial shipping of the adversary—a question, it seems, which should be answered in the negative. With this established, the committee could be trusted to emphasize this thought and to leave out of the discussion the application of the principles of the Declaration of Paris on the effectiveness of blockade to the subject of mines.

It is, in fact, along this line that the committee dealt with the English proposal. It was agreed at the outset that in order to avoid any mistake it was necessary to drop the term blockade used in that proposal.

But whilst it was referred in several quarters to avoid any provision which might unduly restrict the liberty of action of belligerents, and which, however the rule might be expressed, would raise the insurmountable difficulties in its interpretation and application and give rise either to abuses or to mutual recriminations between belligerents, the majority of the committee took the contrary position (fourteen votes to three). The majority hesitated only between the formula finally accepted, which is due to a proposal of his Excellency Mr. Hammarskjöld in cooperation with his Excellency Mr. Hagerup, and the wording of which was modified by his Excellency Count Tornielli, and another formula,¹ which was presented during the discussion by the British delegation and was worded as follows:

The laying by a belligerent of automatic contact mines before a commercial port of its adversary is not authorized except when there is anchored there at least one large fighting unit.

This last formula was intended to reconcile the two opinions, but it was abandoned as soon as it was seen that it could not gain unanimity.

¹ *Actes et documents*, vol. III, p. 671, *annexe* 25.

2. As to the first two paragraphs of Article 4, their guiding idea is that in principle the attacking party must have the same rights and duties that the one on the defense has as to the places where it is permissible to lay mines. Equality in weapons must here also be preserved in principle.

There was an amendment in the contrary sense presented by the delegation of Spain with a view to restrict for the attack the use of automatic contact mines to the hostile waters where the other party exercised effective power.

In support of this proposal the eminently defensive nature of mines was pointed out, and the necessity of avoiding so far as possible all confusion on the subject of responsibility for eventual damage caused by this weapon to the shipping of neutrals. To this suggestion it was answered that it seemed going too far and placing too great a restraint upon the exigencies of belligerents.

Naval war (said his Excellency Vice Admiral Röell) has for its aim to cause the greatest possible damage to the hostile ships in order to bring the war to an end as soon as possible.

One of the principal means is to obstruct the hostile ships in their manœuvres, for example, by preventing them from leaving their port by laying mines and at the same time giving more liberty of movement to one's own vessels. If we limit the laying of mines to maritime zones where effective power is exercised we shall certainly injure operations of an offensive nature on the theatre of war, but this will be going beyond the Spanish proposal, which has only for its object safeguarding neutral ships without at the same time hindering the operations of the belligerents.

The committee, while in principle favouring the point of view of equality for the two belligerents, consented to examine the possibility of finding a certain compromise between the requirements of the attack and the interests of peaceful navigation. Captain Castiglia said that it is fair to give more liberty of action to the country wishing to defend its ports and its coasts with mines, assuming that it can control them more easily, than to the one using mines in the waters of its adversary. Besides the provision of paragraph 3, of which we have just spoken and which already lays quite a serious restriction upon the attacking party, another would be added, limiting the assailant as to the zone in which he may lay mines to the distance of *three miles*: an exception would be made for naval ports and for ports classed with naval ports by reason of establishments located there (Article 3), provided said establishments belonged to the State. Several other members of the committee favoured this view, and the restriction contained in paragraph 2 of Article 4 obtained six votes against two, and nine abstentions.

It follows from this provision that the principle of equality between attack and defense finds an exception with regard to ports that are not naval ports but contain establishments of naval construction or graving-docks. If these establishments belong to the State the limit of the zone is carried to *ten miles* for both belligerents; if they belong to individuals it is only the zone of defense that is carried to *ten miles*, that of attack reaching only *three miles*, with the exception, of course, of the sphere of immediate activity of the belligerents, which, conformably to Article 5, has no fixed limits. It may be recalled, on the subject of distinctions to be made between attack and defense, that the question of knowing whether such a distinction can be justified has received the attention of writers on international law. Mr. Nys especially, in volume 3 of his treatise, declares himself in favour of a limitation that is unequal for the two belligerents. "Doubtless," says the illustrious Belgian writer, "the littoral sea forms a part of the theatre of war, but in the littoral sea the State attacking has none of the rights of the adjacent State; it can not, like the latter, invoke a right of sovereignty; it therefore does not belong to it to exclude neutrals by all means that it deems useful; it must adopt such conduct toward them as is permitted by the law of war; that is to say, blockade by means of ships."

This view of the matter did not prevail in the Institute, which placed the two belligerents on a footing of perfect equality. We are able to state that the text drawn up by the committee of examination follows an intermediate line between the two opinions by admitting exceptions to the principle of equality.

[The Commission decided to omit the articles. Its action is summarized in the Report to the Conference as follows:]

The principal change made by the Commission in the text drafted by the committee consists in the omission of Articles 2 to 5 of the committee's text. These deal with the limits as to area imposed upon belligerents in the use of anchored automatic submarine contact mines. Paragraph 3 of Article 4, which obtained on the first reading a strong majority (24 yeas, 5 nays, 3 abstentions, and 12 absent), and on second reading unanimity save for a few abstentions (33 yeas and 4 abstentions), was the only one kept by the Commission. It now appears as Article 2 of the draft, which we have the honor to submit to the Conference; the rest of the provisions contained in the said articles have disappeared. In fact, from the beginning of our deliberations two opposing tendencies were manifested on the subject of the places where it should be permissible to place anchored automatic contact mines. On one hand it was desired to establish fixed limits within which the employment of such mines would not be forbidden, and on the other a right was claimed in behalf of belliger-

ents to make use of anchored mines without restriction as to place, even on the high seas, within the "sphere of their immediate activity." The committee hoped to be able to find a compromise solution.

1. By permitting the use of anchored automatic contact mines within a zone of three marine miles, which in certain places would be extended to ten miles; a further distinction being established on certain points as to this greater zone between the defense and the attack.

2. By permitting belligerents to make use of such mines in the sphere of their immediate activity even beyond the limits above mentioned; but in this case the mines employed "would have to be so constructed as to be rendered harmless within the maximum period of two hours after the party using them abandoned them."

In the Commission this solution did not obtain an absolute majority of votes. Even paragraph 2 of Article 4, which established the difference mentioned between attack and defense, was rejected, as it obtained only 10 votes, as against 12 nays and 10 abstentions. It was the same with an amendment presented as a compromise by the delegation of Sweden, according to which the prohibitions of Articles 2 to 4 would carry an exception in the case "of an imperious military necessity"; this amendment was likewise rejected by a majority of the Commission.

As to Articles 2 to paragraph 1 of 4, as presented by the committee, they obtained only a relative and rather feeble majority (Article 2: 16 yeas, 11 nays, 10 abstentions; Article 3: 16 yeas, 10 nays, 10 abstentions; Article 4, paragraph 1: 15 yeas, 9 nays, 12 abstentions); and Article 5 of this text was rejected almost unanimously, being opposed both by the delegations that were against any restriction in area and by the delegations that had consented, in order to facilitate an agreement, to permit the use of anchored mines everywhere in the sphere of the immediate activity of the belligerents, subject to the technical restrictions contained in the second paragraph of Article 5. Moreover, very serious doubts were expressed as to the possibility of applying in all circumstances the technical provisions set forth in that paragraph.

The omission of Articles 2 to 5 of the committee's draft necessarily caused the second paragraph of Article 7 and the second paragraph of Article 9 to be dropped. It seemed, however, to be understood that the absence of any provision assigning limits within which neutrals can place mines must not be interpreted as establishing a right on the part of neutrals to place mines on the high seas.

1907, October 18.—Convention concerning the rights and duties of neutral Powers in naval war.—Signed at The Hague.¹

With a view to harmonizing the divergent views which, in the event of naval war, are still held on the relations between neutral Powers and belligerent Powers, and to anticipating the difficulties to which such divergence of views might give rise;

Seeing that, even if it is not possible at present to concert measures applicable to all circumstances which may in practice occur, it is nevertheless undeniably advantageous to frame, as far as possible, rules of general application to meet the case where war has unfortunately broken out;

Seeing that, in cases not covered by the present Convention, it is expedient to take into consideration the general principles of the law of nations;

Seeing that it is desirable that the Powers should issue detailed enactments to regulate the results of the attitude of neutrality when adopted by them;

Seeing that it is, for neutral Powers, an admitted duty to apply these rules impartially to the several belligerents;

Seeing that, in this category of ideas, these rules should not, in principle, be altered, in the course of the war, by a neutral Power, except in a case where experience has shown the necessity for such change for the protection of the rights of that Power;

Have agreed to observe the following common rules, which can not, however, modify provisions laid down in existing general treaties, and have appointed as their plenipotentiaries, to wit:

[Here follow the names of plenipotentiaries.]

Who, after having deposited their full powers, found in good and due form, have agreed upon the following provisions:

ARTICLE 1.

Belligerents are bound to respect the sovereign rights of neutral Powers and to abstain, in neutral territory or neutral waters, from any act which would, if knowingly permitted by any Power, constitute a violation of neutrality.

ARTICLE 2.

Any act of hostility, including capture and the exercise of the right of search, committed by belligerent warships in the territorial waters of a neutral Power, constitutes a violation of neutrality and is strictly forbidden.

¹ Scott, *Reports to The Hague Conferences of 1899 and 1907*, p. 832. For the extent to which the various nations have become parties to this convention, see *post*, p. 507. This convention does not define the marginal sea. It is included in this collection for the reason that any attempt to trace a limit of such waters must take into account the principles and rules here laid down.

ARTICLE 3.

When a ship has been captured in the territorial waters of a neutral Power, this Power must employ, if the prize is still within its jurisdiction, the means at its disposal to release the prize with its officers and crew, and to intern the prize crew.

If the prize is not in the jurisdiction of the neutral Power, the captor Government, on the demand of that Power, must liberate the prize with its officers and crew.

ARTICLE 4.

A prize court can not be set up by a belligerent on neutral territory or on a vessel in neutral waters.

ARTICLE 5.

Belligerents are forbidden to use neutral ports and waters as a base of naval operations against their adversaries, and in particular to erect wireless telegraphy stations or any apparatus for the purpose of communicating with belligerent forces on land or sea.

ARTICLE 6.

The supply, in any manner, directly or indirectly, by a neutral Power to a belligerent Power, of warships, ammunition, or war material of any kind whatever, is forbidden.

ARTICLE 7.

A neutral Power is not bound to prevent the export or transit, for the use of either belligerent, of arms, ammunition, or, in general, of anything which could be of use to an army or fleet.

ARTICLE 8.

A neutral Government is bound to employ the means at its disposal to prevent the fitting out or arming within its jurisdiction of any vessel which it has reason to believe is intended to cruise, or engage in hostile operations, against a Power with which that Government is at peace. It is also bound to display the same vigilance to prevent the departure from its jurisdiction of any vessel intended to cruise, or engage in hostile operations, which had been adapted entirely or partly within the said jurisdiction for use in war.

ARTICLE 9.

A neutral Power must apply impartially to the two belligerents the conditions, restrictions, or prohibitions made by it in regard to the admission into its ports, roadsteads, or territorial waters, of belligerent warships or of their prizes.

Nevertheless, a neutral Power may forbid a belligerent vessel which has failed to conform to the orders and regulations made by it, or which has violated neutrality, to enter its ports or roadsteads.

ARTICLE 10.

The neutrality of a Power is not affected by the mere passage through its territorial waters of warships or prizes belonging to belligerents.

ARTICLE 11.

A neutral Power may allow belligerent warships to employ its licensed pilots.

ARTICLE 12.

In the absence of special provisions to the contrary in the legislation of a neutral Power, belligerent warships are not permitted to remain in the ports, roadsteads, or territorial waters of the said Power for more than twenty-four hours, except in the cases covered by the present Convention.

ARTICLE 13.

If a Power which has been informed of the outbreak of hostilities learns that a belligerent warship is in one of its ports or roadsteads, or in its territorial waters, it must notify the said ship to depart within twenty-four hours or within the time prescribed by local regulations.

ARTICLE 14.

A belligerent warship may not prolong its stay in a neutral port beyond the permissible time, except on account of damage or stress of weather. It must depart as soon as the cause of the delay is at an end.

The regulations as to the question of the length of time which these vessels may remain in neutral ports, roadsteads, or waters do not apply to warships devoted exclusively to religious, scientific, or philanthropic purposes.

ARTICLE 15.

In the absence of special provisions to the contrary in the legislation of a neutral Power, the maximum number of warships belonging to a belligerent which may be in one of the ports or roadsteads of that Power simultaneously shall be three.

ARTICLE 16.

When warships belonging to both belligerents are present simultaneously in a neutral port or roadstead, a period of not less than twenty-four hours must elapse between the departure of the ship belonging to one belligerent and the departure of the ship belonging to the other.

The order of departure is determined by the order of arrival, unless the ship which arrived first is so circumstanced that an extension of its stay is permissible.

A belligerent warship may not leave a neutral port or roadstead until twenty-four hours after the departure of a merchant ship flying the flag of its adversary.

ARTICLE 17.

In neutral ports and roadsteads belligerent warships may only carry out such repairs as are absolutely necessary to render them seaworthy, and may not add in any manner whatsoever to their fighting force. The local authorities of the neutral Power shall decide what repairs are necessary, and these must be carried out with the least possible delay.

ARTICLE 18.

Belligerent warships may not make use of neutral ports, roadsteads, or territorial waters for replenishing or increasing their supplies of war material or their armament, or for completing their crews.

Belligerent warships may only revictual in neutral ports or roadsteads to bring up their supplies to the peace standard.

Similarly these vessels may only ship sufficient fuel to enable them to reach the nearest port in their own country. They may, on the other hand, fill up their bunkers built to carry fuel when in neutral countries which have adopted this method of determining the amount of fuel to be supplied.

If, in accordance with the law of the neutral Power, the ships are not supplied with coal within twenty-four hours of their arrival, the permissible duration of their stay is extended by twenty-four hours.

ARTICLE 20.

Belligerent warships which have shipped fuel in port belonging to a neutral Power may not within the succeeding three months replenish their supply in a port of the same Power.

ARTICLE 21.

A prize may only be brought into a neutral port on account of unseaworthiness, stress of weather, or want of fuel or provisions.

It must leave as soon as the circumstances which justified its entry are at an end. If it does not, the neutral Power must order it to leave at once; should it fail to obey, the neutral Power must employ the means at its disposal to release it with its officers and crew and to intern the prize crew.

ARTICLE 22.

A neutral Power must, similarly, release a prize brought into one of its ports under circumstances other than those referred to in Article 21.

ARTICLE 23.

A neutral Power may allow prizes to enter its ports and roadsteads, whether under convoy or not, when they are brought there to be sequestered pending the decision of a prize court. It may have the prize taken to another of its ports.

If the prize is convoyed by a warship, the prize crew may go on board the convoying ship.

If the prize is not under convoy the prize crew are left at liberty.

ARTICLE 24.

If, notwithstanding the notification of the neutral Power, a belligerent ship of war does not leave a port where it is not entitled to remain, the neutral Power is entitled to take such measures as it considers necessary to render the ship incapable of taking the sea during the war, and the commanding officer of the ship must facilitate the execution of such measures.

When a belligerent ship is detained by a neutral Power, the officers and crew are likewise detained.

The officers and crew thus detained may be left in the ship or kept either on another vessel or on land, and may be subjected to the measures of restriction which it may appear necessary to impose upon them. A sufficient number of men for looking after the vessel must, however, be always left on board.

The officers may be left at liberty on giving their word not to quit the neutral territory without permission.

ARTICLE 25.

A neutral Power is bound to exercise such surveillance as the means at its disposal allow to prevent any violation of the provisions of the above articles occurring in its ports or roadsteads or in its waters.

ARTICLE 26.

The exercise by a neutral Power of the rights laid down in the present Convention can under no circumstances be considered as an unfriendly act by one or other belligerent who has accepted the articles relating thereto.

ARTICLE 27.

The contracting Powers shall communicate to each other in due course all laws, proclamations, and other enactments regulating in their respective countries the status of belligerent warships in their ports and waters, by means of a communication addressed to the Netherland Government and forwarded immediately by that Government to the other contracting Powers.

ARTICLE 28.

The provisions of the present Convention do not apply except between contracting Powers, and then only if all the belligerents are parties to the Convention.

ARTICLE 29.

The present Convention shall be ratified as soon as possible.

The ratifications shall be deposited at The Hague.

The first deposit of ratifications shall be recorded in a *procès-verbal* signed by the representatives of the Powers which take part therein and by the Netherland Minister of Foreign Affairs.

The subsequent deposits of ratifications shall be made by means of a written notification addressed to the Netherland Government and accompanied by the instrument of ratification.

A duly certified copy of the *procès-verbal* relative to the first deposit of ratifications, of the ratifications mentioned in the preceding paragraph, as well as of the instruments of ratification, shall be at once sent by the Netherland Government, through the diplomatic channel, to the Powers invited to the Second Peace Conference, as well as to the other Powers which have adhered to the Convention. In the cases contemplated in the preceding paragraph, the said Government shall inform them at the same time of the date on which it received the notification.

ARTICLE 30.

Non-signatory Powers may adhere to the present Convention.

The Power which desires to adhere notifies in writing its intention to the Netherland Government, forwarding to it the act of adhesion, which shall be deposited in the archives of the said Government.

That Government shall at once transmit to all the other Powers a duly certified copy of the notification as well as of the act of adhesion, mentioning the date on which it received the notification.

ARTICLE 31.

The present Convention shall come into force in the case of the Powers which were a party to the first deposit of the ratifications, sixty days after the date of the *procès-verbal* of that deposit, and, in the case of the Powers who ratify subsequently or who adhere, sixty days after the notification of their ratification or of their decision has been received by the Netherland Government.

ARTICLE 32.

In the event of one of the contracting Powers wishing to denounce the present Convention, the denunciation shall be notified in writing to the Netherland Government, who shall at once communicate a duly certified copy of the notification to all the other Powers, informing them of the date on which it was received.

The denunciation shall only have effect in regard to the notifying Power, and one year after the notification has been made to the Netherland Government.

ARTICLE 33.

A register kept by the Netherland Ministry for Foreign Affairs shall give the date of the deposit of ratification made by Article 29, paragraphs 3 and 4, as well as the date on which the notifications of adhesion (Article 30, paragraph 2) or of denunciation (Article 32, paragraph 1) have been received.

Each contracting Power is entitled to have access to this register and to be supplied with duly certified extracts.

In faith of which the plenipotentiaries have appended their signatures to the present convention.

Done at The Hague, October 18, 1907, in a single original, which shall remain deposited in the archives of the Netherland Government, and duly certified copies of which shall be sent, through the diplomatic channel, to the Powers which have been invited to the Second Peace Conference.

[Here follow signatures.]

RATIFICATIONS, ADHESIONS, AND RESERVATIONS.

The foregoing convention was *ratified* by the following signatory Powers: Austria-Hungary, Belgium, Brazil, Denmark, France, Germany, Guatemala, Haiti, Japan, Luxemburg, Mexico, Netherlands, Norway, Panama, Portugal, Roumania, Russia, Salvador, Siam, Sweden, Switzerland.

Adhesions: China, Liberia, Nicaragua, United States.

The following Powers signed the Convention but have not yet ratified: Argentine Republic, Bolivia, Bulgaria, Chile, Colombia, Dominican Republic, Ecuador, Great Britain, Greece, Italy, Montenegro, Paraguay, Persia, Peru, Serbia, Turkey, Uruguay, Venezuela.

*Reservations:*¹

CHINA: Adhesion with reservation of paragraph 2 of Article 14, paragraph 3 of Article 19, and of Article 27.

DOMINICAN REPUBLIC: With reservation regarding Article 12.

GERMANY: Under reservation of Articles 11, 12, 13, and 20.²

GREAT BRITAIN: Under reservation of Articles 19 and 23.

JAPAN: With reservation of Articles 19 and 23.²

PERSIA: Under reservation of Articles 12, 19, and 21.

SIAM: Under reservation of Articles 12, 19, and 23.²

¹ All these reservations, except those of China and the United States, were made at signature.

² Reservation maintained at ratification.

TURKEY: Under reservation of the declaration concerning Article 10 contained in the *procès-verbal* of the eighth plenary session of the Conference held on October 9, 1907.

Extract from the procès-verbal:

The Ottoman delegation declares that the straits of the Dardanelles and the Bosphorus can not in any case be referred to by Article 10. The Imperial Government could undertake no engagement whatever tending to limit its undoubted right over these straits.¹

UNITED STATES: The act of adhesion contains the following reservation:

That the United States adheres to the said Convention, subject to the reservation and exclusion of its Article 23 and with the understanding that the last clause of Article 3 thereof implies the duty of a neutral Power to make the demand therein mentioned for the return of a ship captured within the neutral jurisdiction and no longer within that jurisdiction.

¹ Statement of Turkhan Pasha. *Actes et documents*, vol. 1, p. 285.

AUSTRIA¹

1803, August 7.—*Ordinance respecting the observance of neutrality.*²

ARTICLE 11. As all vessels without exception should enjoy the protection that is derived from neutrality and perfect security in all of the ports, roadsteads, and along the coasts subject to our dominion, hostilities by one or more vessels of Powers at war will not be permitted in the said ports or within *gun range* of the shore, nor, consequently, any combat, pursuit, attack, visit or seizure of vessels. All our authorities, and particularly the military commanders in sea-ports, must use especial vigilance to this end.

ARTICLE 12. In virtue of rights resulting from the same neutrality, vessels of belligerent Powers will not be permitted to cruise before our ports within the distance mentioned in the preceding article, in order to await vessels leaving or entering; much less to stop in the said ports with the design of going to meet vessels that are due to arrive or to follow those that wish to put to sea.

1866, May 20.—*Instructions for the admission and treatment of war-ships belonging to friendly nations on the Austrian coasts.*³

Moreover, communication with the Turkish shores of Sutturina, situated within the range of the naval port of Cattaro, is prohibited to every ship of a foreign nation under any circumstances, in virtue of the existing treaties.

§ 9. If a war-ship that has advanced within a *cannon shot range* should not hoist her flag, then the nearest work is to fire a blank cannon shot, and two minutes afterwards a shot with ball in front of the ship's bow by way of warning, and if this should not be attended to within three minutes, the ship is to be fired at with shot.

§ 10. Foreign war-ships are not allowed to take soundings with boats and relations in those waters which are within *shot range* of an Austrian fortification.

§ 11. Foreign ships are not allowed to practise firing within *shot range* of a fortified port, and in other ports only after due understanding with the political authority.

¹ See also Austria and Hungary.

² Translation. For the French text, see Martens, *Recueil de traités*, 2d ed., vol. 8, p. 109.

³ Translation. *British and Foreign State Papers*, vol. 63, p. 1073.

§ 17. The following are declared to be naval ports:

a. The port of Venice, and also the expanse of sea lying within *cannon shot range* from fort Brondolo to the lighthouse of Piave.

1881, March 23.—*Order of the Minister of Finance, establishing a customs zone of four marine miles.*¹

ARTICLE 2. All national and foreign ships coming from abroad and destined for a native harbor, and, in general, all vessels which approach the customs zone to a distance of *four marine miles*, unless forced there by uncontrollable circumstances, must be furnished with a manifest.

1901, March 1.—*Rules regarding the conduct of vessels of commerce when they meet vessels of war or when they are moored before Austro-Hungarian fortifications.*²

I. Ruling of March 1, 1901, decreed by the Minister of Commerce regarding the conduct of merchant vessels and yachts when they meet vessels of war or when they are moored before fortifications.

1. Austrian vessels of commerce should hoist their flag whenever they meet a vessel of war which is displaying its flag.—The same obligation rests upon foreign vessels of commerce in territorial waters.

2. Austrian and foreign vessels of commerce should hoist their flag, when they are at anchor or moving in their course within *three marine miles* of a fortification on the coast of Austria or Hungary from which a flag is displayed.

3. Austrian vessels of commerce should hoist their flag in foreign territorial waters at least *three miles* from the coast whenever they meet a vessel of war of the State situated on said coast, which is displaying its flag, or whenever they are at anchor or moving in their course before fortifications from which a flag is displayed.

AUSTRIA-HUNGARY³

1891, December 6.—*Treaty of commerce and navigation with Italy, whereby the two countries agree to reserve exclusively to the inhabitants of the coast coral and sponge fishing to a distance of one nautical mile.*⁴

¹ Translation. For the original text, see *Reichsgesetzblatt*, vol. for 1881, p. 100.

² Translation. For the French and German texts, see *Revue générale de droit international public*, vol. 20, doc., p. 53; Martens, *Nouveau recueil général de traités*, 3d series, vol. 4, p. 152; *Oesterreichisches Reichsgesetzblatt*, 1901, No. 8.

³ See also Austria, ante, p. 509.

⁴ See post, p. 599.

BELGIUM

1662.—*Amended treaty of peace between the Federated States of Belgium and the Kingdom of Algiers.*¹

IV. Ships of the afore-mentioned lordly estates shall not be visited. In case, however, the suspicion arises that the sailors and officials do not own those of the said ships which went out on the high seas to meet ships which had been sent out and were cruising about over the seas—being either private Algerian ships or subject to the jurisdiction of Algiers—said ships, upon their return from Algiers, in order to avoid all confusion, should come to at a distance at which a ship could be struck by *cannon shot*. But they shall have power to send their light boats and skiffs to the shores of the canals of the praiseworthy subjects of the lordly estates, provided, however, that only two or three men go together to have their passage and marine letters examined.

1832, June 7.—*Law providing for the establishing of a single customs zone.*²

ARTICLE 1. . . . The executive power shall trace, before the 25th of June, next, the course of a new customs line, at a distance of more than one myriameter from the extreme land frontier and of one-half myriameter from the sea-coast.

Extending from the coast for the distance of *one myriameter* into the sea, there shall be a surveillance determined by the two following articles.

1891, June 24.—*Treaty of commerce and navigation with Egypt.*³

XII. . . . In case of suspicions of contraband, the Egyptian customs officers may board and seize any Belgian vessel of less than two hundred tons burden outside the waters of an Egyptian port or navigating within a radius of *ten kilometers* of the shore; besides, any Belgian vessel of less than two hundred tons burden may be boarded and seized beyond that distance if the pursuit has been commenced within a radius of *ten kilometers* of the coast.

¹ Translation. For the original text see Dumont, *Corps universel diplomatique du droit des gens*, Amsterdam, 1728, vol. 6, pt. 2, p. 445.

² Translation. For the original text see *Code des contributions directes, douanes et accises de la Belgique en vigueur au 1^{er} août, 1852*, p. 621.

³ Translation. For the French text, see *British and Foreign State Papers*, vol. 84, p. 154.

1891, August 19.—*Law prohibiting foreign vessels from fishing in Belgian territorial waters.*¹

ARTICLE 1. In conformity with the stipulations of Arts. II and III of the international convention concluded at The Hague on the 6th of May, 1882, approved by the law of January 6th, 1884, fishing, whether carried on from the vessel or from her detached boat, is for the future forbidden to every foreign vessel, within the distance of *three geographical miles* of 60 to the degree of latitude, reckoned from low-water mark, along the whole extent of the Belgian coast.

CHILE .

*The civil code.*²

ARTICLE 593. The contiguous sea to the distance of *a marine league* counted from the low-water line is a territorial sea appertaining to the national domain; but the right of police, in all matters concerning the security of the country and the observance of the customs laws, extends to the distance of *4 marine leagues* counted in the same manner.

1914, November 5.—*Decree of the Government of Chile as to what should be considered the jurisdictional waters of Chile in reference to neutrality.*³

Considering that, although it is true that the laws of the Republic have determined the limits of the territorial sea and of the national domain, and the distance to which extend the rights of police in all matters concerning the security of the country and the observance of customs laws, they have not fixed the maritime zone in reference to the safeguarding of the rights and the accomplishment of the duties relative to the neutrality declared by the Government in case of international conflicts; and that it is proper for sovereign states to fix this zone:

It is decreed:

The contiguous sea, up to a distance of *3 marine miles* counted from the low-water line is considered as the jurisdictional or neutral sea on the coasts of the Republic for the safeguarding of the rights and the accomplishment of the duties relative to the neutrality declared by the Government in case of international conflicts.

¹ Translation. Hertslet, *Commercial Treaties*, vol. 19, p. 115.

² U. S. Naval War College, *International Law Topics*, 1916, p. 19, note.

³ *Ibid.*, p. 19; *Revue générale de droit international public*, vol. 23, doc., p. 11.

1914, December 15.—Decree of the Government of Chile as to what should be considered as a jurisdictional sea in the southern part of Chile, especially in the Strait of Magellan.¹

Considering that the Strait of Magellan as well as the canals of the southern region lie within the international limits of Chile, and consequently form part of the territory of the Republic,

It is decreed:

In reference to the neutrality established in the decree No. 1857 of November 5 last of the Ministry of Foreign Affairs, the interior waters of the Strait of Magellan and the canals of the southern region, even in the parts which are distant more than 3 miles from either bank, should be considered as forming part of the jurisdictional or neutral sea.

CHINA

1899, December 14.—Treaty of friendship, commerce, and navigation with Mexico, by which the extent of the marginal sea is considered as three marine leagues measured from the line of low tide.²

DENMARK³

1598, May 10.—Ordinance establishing two Norwegian leagues as a neutral zone.⁴

If any English vessels, contrary to the orders of the king, are found hovering and fishing in the waters between Vespenø and Iceland, or two Norwegian leagues (*uker sjøs*⁵) northeast from Vespenø, make all haste possible to capture them and bring them to Copenhagen.

¹ U. S. Naval War College, *International Law Topics*, 1916, p. 21; *Revue générale de droit international public*, vol. 23, doc., p. 13.

² See *post*, p. 605.

³ See also Denmark and Norway, *post*, p. 517.

⁴ Translation. For the Norwegian text, see Arnold Ræstad, *Kongens strømmen*, p. 195.

⁵ Ræstad's definition of *mil* and *uke sjøs*: two main interpretations of the word *mil* have been recognized from the Middle Ages: The Italian marine *mil*, which, according to the computations of Wagner, Stegers, and Kretschmers, is shorter than the Roman league, about 1,200 to 1,250, or probably 1,300 meters, and the Spanish *legua*, French *lieue*, and the English *league*, which are about four times the length of the Italian marine *mil*, or about 5,500 meters. These designations, *mille* and *lieue*, *mile* and *league*, are often confused in literature. . . . Besides these, Behrmann claims he can prove a third, the Low German *mil*, of 6,600 meters. The question is hereby raised as to whether this Low German *mil* has sprung from the Northern (Norwegian-Swedish-Danish) measure of length, *vika sjóvar*, which originally seems to have equalled about 9 km. (later, 12 *uker sjøs* equalled 1 degree or 72,916 paces or 3½ feet, Roman measure), but which later, in the 16th century, came to be considered as 7 or 8 km. One *uke sjøs* became interpreted in the 17th century, in Dano-Norwegian, as: one league (*mil*), one marine league, one old marine league, and is the same as one geographical league (7,420 m.). Ræstad, *ibid.*, p. 186.

1631, December 13.—*Declaration of Christian IV to Charles I.*¹

We do not doubt that Your Majesty knows we have willingly permitted Your Majesty's subjects, for the time being, to fish along the coasts of our islands, Iceland and Vespenø, providing they always remain at a distance of *six Norwegian leagues* (*uker sjøs*²) from the coast. . . . Therefore, I recommend Your Majesty . . . to warn your subjects to carry on fishing at a distance of *at least six leagues* from the main coast.

1636, April 16.—*Licence granted to the Iceland Whaling Company, and ordinance dealing with prize regulations to a distance of four old Norwegian marine miles (mil) or six leagues.*³

1643, April 21.—*Letters patent.*⁴

All cruisers or fishing vessels, by whatsoever name designated, which do not belong to our privileged subjects, or to the old English or United Provinces Company possessing our octroi and license, are hereby solemnly bidden not to presume or venture within *ten leagues* (*mil*) of our land at Christianberg, set aside for whaling, with intent to hunt or disturb whales. . . .

1682, May 13.—*Manifesto regarding the management of the trade and fishing along Iceland and the Færø group.*⁵

ARTICLE 2. It shall be lawful for said company alone to trade, buy, and sell in Iceland, the Færø group, and the other small outlying ports and bays, as well as to fish within a distance of *four Norwegian leagues* (*mil*⁶) from the coasts. . . .

1691, June 13.—*King's order in council, regarding maritime prizes.*⁷

If our cruising frigates encounter any man of war or privateer from any of the belligerents, that might have been captured in Nessed or Rifved, or *within sight of our coasts*, which is computed as *four or five leagues* (*mil*) from the outlying rocks, they shall courteously demand their freedom, considering them as invalid captures. . . .

¹ Translation. For the Norwegian text, see Arnold Ræstad, *Kongens strømme*, p. 215.

² See footnote 5, *ante*, p. 513.

³ Stephensen and Sigurdson, *Lovsamling for Island*, Copenhagen, 1853, vol. 1, p. 220.

⁴ Translation. For the Norwegian text, see Ræstad, *ibid.*, p. 225.

⁵ Translation. For the Danish text, see Stephensen and Sigurdson, *ibid.*, vol. 3, p. 388; Ræstad, *ibid.*, p. 236.

⁶ One Norwegian league (*mil*) was at that time a little more than five English miles, i. e., a little less than 8 km. See footnote 5, *ante*, p. 513.

⁷ Translation. For the Norwegian text, see Ræstad, *ibid.*, p. 246.

1691, June 15.—Royal admiralty order to Captain Moss of "*Lindormen*."¹

Keep the cruisers out of the royal channels, and oppose all men of war, privateers, and frigates, which may have made captures . . . *within sight of the coasts* of His Majesty.

1744, August 10.—Instructions given out by the admiralty to the captain of the frigate "*Falster*."²

If he should encounter merchantmen belonging to any foreign power, or any privateer whatsoever, bringing into our ports ships belonging to our subjects and recognized in treaties with England, France, and Holland as free ships, or if they should presume to capture ships *within sight* of our coasts at *four leagues*, he must seize said merchantmen or privateers and bring them to port as prizes to be tried.

1767, June 6.—Communication regarding the limits for foreign fishery along Iceland.³

Since it has pleased your Excellencies on the occasion of the change in the *four league* limit, which has been established by the Iceland octroi, within which limit foreigners and Danish subjects are not allowed to practise ocean fishery, to ask how the limit is to be interpreted around Iceland, for foreign fishermen; therefore, I have been assigned the duty to answer in accordance with the decision of the royal exchequer that it is deemed wise to keep foreigners in the open sea at a distance of *four leagues* from the coasts of Iceland, and prohibit them to fish within said limit.

1836, March 19.—Decision of the exchequer regarding fishing privileges in Iceland.⁴

Foreign ships are not permitted to fish within the distance of a *Danish league* from the coasts (of Iceland).

1854.—Instructions for the guidance of commanders of Danish ships of war during the Crimean War.⁵

4. The Danish territory extends *one Danish mile* from the *terra firma* of the King's country (see the circular from the ministry of

¹ Translation. For the Norwegian text, see Arnold Ræstad, *Kongens strømme*, p. 247.

² Translation. For the Norwegian text, see *ibid.*, p. 253.

³ Translation. For the Danish text, see Stephensen and Sigurdson, *Løtsamling for Island*, vol. 3, p. 591.

⁴ Translation. For the Danish text, see *ibid.*, vol. 10, p. 714.

⁵ *Message of the President of the United States (Foreign Relations)*, 1869, p. 262.

August 18, 1810), excepted herefrom, however, is the sound at Kronborg and the Elbe at Glückstadt, where Danish territory only stretches a *cannon shot* from land, or 3,000 *ells*.

1880, June 8.—*German notice respecting the observance by German fishermen of the limits of Danish coast fishing grounds.*¹

The Royal Danish Government intends to station the gunboat *Villemoes* during the present summer on the Danish coast, in order to guard the fishing in the Danish waters. The commander will receive orders to drive away foreign fishermen who attempt illegally to fish within Danish waters. The Royal Danish Government will consider as belonging to these waters the space up to the *three sea miles* out to sea from the extreme limit of the land; bays, the entrances to which do not exceed ten miles, will be considered as inland waters.

1888, November 12.—*Letter from Count von Sponneck, Danish Minister at Washington, to Secretary of State Bayard transmitting decrees of March 18, 1776, and May 8, 1884, containing notices to mariners in the Davis Straits.*²

. . . As to fishing, the Government of the King can not admit that foreigners are at liberty to engage in it in Danish water, that is to say, at the distance of *one Danish mile* from the coast, but outside of this limit Denmark raises no claim.

1899, July 14.—*Fishery treaty with Sweden, establishing a limit for fishery.*³

ARTICLE 1. In the territorial waters bordering on the kingdoms of Denmark and Sweden, the territory reserved exclusively for the subjects of each land respectively, shall comprise, with the exceptions enumerated in Article II, an extent of *one geographical league* (1/15th degree of latitude) from the coast or the outermost outlying islands and islets which are not constantly overflowed by the sea.

1900, April 7.—*Danish law respecting illegal trawling in territorial waters.*⁴

It should be borne in mind that as regards the Danish Coast bordering on the North Sea, south of Hanstholm Lighthouse, Articles

¹ Hertslet, *Commercial Treaties*, vol. 15, p. 207.

² MS., Department of State. No extent of the marginal sea is mentioned in the decrees referred to.

³ Translation. For the Danish text, see Thomas W. Fulton, *The Sovereignty of the Sea*, p. 655, note 2.

⁴ Hertslet, *ibid.*, vol. 21, p. 355.

II and III of the North Sea Fisheries Convention, 1882, to which Denmark is a party, apply.

These articles are as follows:

ARTICLE II. The fishermen of each country shall enjoy the exclusive right of fishery within the distance of *three miles* from low-water mark along the whole extent of the coasts of their respective countries, as well as of the dependent islands and banks.

As regards bays, the distance of *three miles* shall be measured from a straight line drawn across the bay, in the part nearest the entrance, at the first point where the width does not exceed *ten miles*.

The present article shall not in any way prejudice the freedom of navigation and anchorage in territorial waters according to fishing boats, provided they conform to the special police regulations enacted by the Powers to whom the shore belongs.

ARTICLE III. The miles mentioned in the preceding article are geographical miles, whereof sixty make a degree of latitude.

1901, June 24.—Convention between Great Britain and Denmark for regulating the fisheries outside territorial waters in the ocean surrounding the Færø Islands and Iceland.¹

II. The subjects of His Majesty the King of Denmark shall enjoy the exclusive right of fishery within the distance of *three miles* from low-water mark along the whole extent of the coasts of the said islands, as well as of the dependent islets, rocks, and banks.

As regards bays, the distance of *three miles* shall be measured from a straight line drawn across the bay, in the part nearest the entrance, at the first point where the width does not exceed *ten miles*.

III. The miles mentioned in the preceding article are geographical miles whereof sixty make a degree of latitude.

DENMARK AND NORWAY²

1631, December 16.—Decree establishing a protective zone in the territorial waters.³

And if any foreigners, whether whale hunters or English sea fishermen, come within *four geographical leagues* (*mil*⁴), or if those from other nations come within *six leagues* of the coast, they shall be attacked.

¹ Hertslet, *Commercial Treaties*, vol. 23, p. 425.

² See also Denmark; Norway; Sweden and Norway, *ante*, p. 513; *post*, pp. 607, 629.

³ Translation. For the Norwegian text, see Arnold Ræstad, *Kongens strømme*, p. 216.

⁴ See *ante*, p. 513, note 5.

1691, June 9.—*Royal decree regarding prizes.*¹

Also those ships which are captured *within sight of the coasts* of Norway and Jutland shall be ruled as free, while those captured . . . out of sight of our coasts and brought into our ports, shall be considered as good prizes.

1691, December 8/18.—*Treaty between Great Britain and the Netherlands, and Denmark and Norway.*²

ARTICLE 6. No enemy of Great Britain or the Netherlands shall be allowed to capture, with war vessels or privateers, any ships belonging to the subjects of the said Powers *within sight of the dominion* of the Dano-Norwegian King, either in his bays, ports or rivers, or in the open sea, whether said ships are entering the ports of the King or departing from them.

1756, May 7.—*Decree concerning prizes.*³

The privateers of any of the belligerent Powers are forbidden to capture any ships within a distance of *one league (mil⁴)* from our coasts.

1759, July 27.—*Prize decision sent to the civil governor in Christian-sand to apply to the case of a prize taken by a French privateer.*⁵

The distance at which the ship in question was captured is more than *one German league* from the mainland; accordingly, the ground on which the French privateer considered the ship captured as a prize, namely, that it had not yet been determined whether said prize was captured within the distance of the league established by our most gracious rescripts of May 7, 1756,⁶ and February 23, 1759,⁴ is hereby declared null and void.

1807, September 14.—*Decree forbidding the capture of prizes in neutral territory.*⁷

ARTICLE 5 forbids captures within the territory of friendly or neutral Powers, which territory is considered as extending *one marine league* from the coasts.

¹ Translation. For the Norwegian text, see Arnold Ræstad, *Kongens strømme*, p. 245.

² Translation. For the Norwegian text, see *ibid.*, p. 251.

³ Translation. For the Norwegian text, see *ibid.*, p. 331.

⁴ According to the rescript of February 23, 1759, the *mil* mentioned in the ordinance for May 7, 1756, is to be understood as the ordinary *marine league* whereof fifteen make a degree of latitude. As no extent of the marginal sea is mentioned in the rescript of February 23, it is not printed in this volume. J. A. S. Schmidt, *Rescripter, resolutioner og collegial-breve for kongeriget Norge for tidsrummet 1680-1813*, vol. 1, p. 487.

⁵ Translation. For the Norwegian text, see Ræstad, *ibid.*, p. 332.

⁶ See *supra*.

⁷ Translation. For the Norwegian text, see Ræstad, *ibid.*, p. 333.

1810, March 28.—Decree forbidding Danish and Norwegian privateers from capturing enemy vessels in the territorial sea of any State.¹

ARTICLE 7. No privateer shall, at the risk of losing its commission or undergoing whatsoever punishment the occasion may demand, take any prizes, or in any way make use of said commission within the territory belonging to friendly or neutral Powers, which territory is usually considered as extending *one league* from the coast. As regards Øresund, it is to be noted that the privateers are not permitted to remain near the Swedish batteries or within *cannon range* of the Swedish coasts.

1812, February 22.—Royal ordinance.²

We will that it be established as a rule in all cases where it is a question of determining the maritime boundary of our territory, that that territory shall be reckoned to the ordinary distance of *one marine league* from the outermost islands or islets which are not overflowed by the sea.

FRANCE

1682, January 29.—Treaty with Morocco.³

ARTICLE 5. In case any French merchant vessel in one of the ports or roadsteads of the dominion of the Emperor of Morocco should be attacked by enemy war vessels, even by those of Algeria and Tunis, or others from the ports on the African coasts, they shall be defended and protected by the cannon of the harbor fortifications, and shall be given sufficient time to depart from the ports, during which time, the enemy vessels shall be retained and be forbidden to pursue; and the same shall be done by the Emperor of France, on the condition that the war vessels of the Emperor of Morocco or his subjects shall make no captures within the limit of *six leagues* of the coasts of France.

1691, August 6.—The French Ambassador at Copenhagen to the Dano-Norwegian Government.⁴

Respect of the coasts of any part of Europe whatsoever has never been extended further than *cannon range*, or *a league or two* at the most.

¹ Translation. For the Danish text, see Damkier and Kretz, *Love og anordninger samt reskripter, m. m. Supplement*, vol. 3, p. 468.

² Thomas W. Fulton, *The Sovereignty of the Sea*, p. 653.

³ Translation. For the French text, see J. Dumont, *Corps universel diplomatique du droit du gens*, vol. 7, pt. 2, p. 18.

⁴ Translation. For the French text, see Arnold Ræstad, *La mer territoriale*, p. 111.

1726, August 19.—*Regulation regarding customs search.*¹

Foreign and other small vessels, sailing along the sea coast within a distance of *one or two leagues* therefrom shall be stopped by the employees of custom-house tenders, barks, and sloops of contractors (*adjudicataires*), for verification and visit. We permit the said employees, in case of refusal or resistance, to compel by force the masters of the said vessels to allow them on board. We desire that in case of fraud or forged bills of lading, the said small seagoing craft which are laden with contraband goods or salt, in whole or in part, shall be confiscated, together with their cargoes, to the profit of the contractor; and that the masters of the said vessels, sailors, and others of the crews shall be condemned to pay the penalties provided by our ordinances, declarations and regulations for engaging in illicit salt trade or commerce in prohibited goods, in accordance with our Council's decision of March 9, 1719.²

1763, February 10.—*Definitive treaty of peace with Great Britain.*³

ARTICLE 5. The subjects of France shall have the liberty of fishing and drying, on a part of the coasts of the Island of Newfoundland, such as it is specified in Article 13 of the Treaty of Utrecht; which article is renewed and confirmed by the present treaty (except what relates to the Island of Cape Breton, as well as to the other islands and coasts in the mouth and in the Gulph of St. Lawrence). And His Britannic Majesty consents to leave to the subjects of the Most Christian King the liberty of fishing in the Gulph St. Lawrence, on condition that the subjects of France do not exercise the said fishery, but at the distance of *three leagues* from all the coasts belonging to Great Britain, as well those of the continent, as those of the islands situated in the said Gulph St. Lawrence. And as to what relates to the fishery on the coasts of the Island of Cape Breton out of the said gulph, the subjects of the Most Christian King shall not be permitted to exercise the said fishery, but at the distance of *fifteen leagues* from the coasts of the Island of Cape Breton; and the fishery on the coasts of Nova Scotia or Acadia, and everywhere else out of the said gulph, shall remain on the foot of former treaties.

¹ Translation. For French text, see Léon Béquet, *Répertoire du droit administratif* (Paris, 1896), vol. 18, p. 207, note 4.

² This regulation appears for the first time in the Carlier lease of August 19, 1726 (Article 395). Continued by the Forceville lease of Sept. 16, 1738 (Article 391), it has definitively taken its place in the customs laws.

³ *British and Foreign State Papers*, vol. 1, pt. 1, p. 422.

1767, May 28.—*Treaty of peace and commerce with Morocco.*¹

ARTICLE 6. In case of rupture of the peace existing between the Emperor of France and the Regencies of Algiers, Tunis, and Tripoli, and others, and if it should happen that a French vessel, pursued by an enemy, should seek refuge in the ports of the Emperor of Morocco, the governors of the said ports are obliged to extend it guaranties and to drive away the enemy; or rather to detain the latter in the port a sufficient time to allow the pursued vessel to depart; furthermore the vessels of the Emperor of Morocco may not cruise along the coasts of France within a distance of *thirty miles* of the coast.

1774, December 27.—*Treaty with Spain authorizing French and Spanish customs authorities to seize, up to a distance of two leagues from the coasts, French and Spanish ships carrying forbidden goods.*²

ARTICLE 8. The customs employees and officials of the two crowns, whose duty it is to prevent the introduction of smuggled goods, shall have the authority to stop all kinds of small boats of each nation weighing less than 100 ton, which they find laden wholly or partially with any contraband goods whatsoever, or with merchandise absolutely prohibited, at a distance of *two leagues* from the land, in the neighborhood of the ports, in the mouths of the rivers, the small bays, and anchoring places along the coasts.

1786, September 26.—*Treaty of navigation and commerce with Great Britain.*³

41. Neither of their said Majesties shall permit the ships or goods belonging to the subjects of the other to be taken within *cannon shot* of the coast, or in the ports or rivers of their dominions, by ships of war, or others having commission from any prince, republic or city whatsoever; but in case it should so happen, both parties shall employ their united force to obtain reparation of the damage thereby occasioned.

1787, January 11.—*Treaty with Russia regarding territorial waters.*⁴

ARTICLE 28. In consequence of these principles, the High Contracting Parties pledge themselves reciprocally, in case one of them makes

¹ Translation. For the French text, see Martens, *Recueil de traités*, 2d ed., vol. 1, p. 451.

² Translation. For the French text, see *ibid.*, vol. 2, p. 367.

³ George Chalmers, *A Collection of Treaties between Great Britain and Other Powers*, vol. 1, p. 541.

⁴ Translation. For the French text, see Martens, *ibid.*, 2d ed., vol. 4, p. 210.

war against another Power, to never attack the vessels of his enemy within *cannon range* of the coasts of his ally. They pledge themselves also to mutually observe the most perfect neutrality in the harbors, ports, gulfs, and other waters included in the name of enclosed waters, which belong to them respectively.

1791, August 6-22.—*Law limiting the extent of the coastal waters to two leagues.*¹

TITLE XIII, ARTICLE 7. The officers of the said police boats shall be enabled to visit the boats below fifty ton, which are in the waters within a distance of *two leagues* of the shores, and shall be shown bills of lading regarding the cargo.

1794, March 24 (4 germinal, year II).—*Law limiting the extent of coastal waters to four leagues.*²

TITLE II.

ARTICLE 3. The captain, arriving within *four leagues* of the coast, shall, on request, display a copy of the manifest to the official who comes on board, who will visé the original.

ARTICLE 7. The captains and officers and other customs officials, the officers of commerce and of the military marine can visit all boats below 100 ton, anchored or hovering within *four leagues* of the coasts of France, except in the case of *force majeure*.

1795, May 25.—*Treaty with the regency of Tunis, fixing area of territorial waters at extreme cannon range.*³

Although in the old treaties made between France and Tunis, it was stated that the cruisers of the regency might pursue their course at a distance of *thirty miles* from the French coasts, still, as this stipulation is a subject of frequent discussion between the two Powers, they have agreed to abolish it; in the future, the limit of immunity both for the battleships of the French Republic and the ones

¹ Translation. For the French text, see Duvergier, *Collection complète des lois, décrets, ordonnances, réglemens, avis du Conseil d'Etat*, 1791, vol. 3, p. 197.

² Translation. For the French text, see Duvergier, *ibid.*, vol. 7, p. 115; Léon Béquet, *Répertoire du droit administratif*, vol. 13, p. 392.

³ Translation. For the French text, see Martens, *Recueil de traités*, 2d ed., vol. 6, p. 123.

of Tunis, as well as for their respective enemies, is fixed at extreme cannon range.

1799, June 27 (9 messidor, year VII).—Law.¹

By maritime coasts are understood places washed by the waters of the sea at low tide. Policing is carried on from this point to the distance of *two myriameters* out to sea.

1800, July 16 (27 thermidor, year VIII).—Decree of the Prize Council.²

A capture is unlawful if it is made within a *half league* of the territory of a neutral country.

According to the law agreed upon by maritime Powers, and by general practice, it is established that a privateer can not be permitted any act of hostility or even any visitation against an enemy vessel if this vessel is within a set distance of the territory of a neutral Power. This distance has been set at *two leagues*.

. . . the wish of the most estimable publicists is to limit the claims of the territory as much as possible when these claims are motivated by ambitious or fiscal interests; but when, as in the present question, the rule of *two leagues* assumes not so much the desire of the sovereigns to extend their dominion as the wish to protect the unfortunate and offer them a shelter, this rule has been approved and adopted as a true public good.

1817, March 27.—Law establishing a customs zone of *two myriameters*.³

ARTICLE 13. The same penalty shall apply, as before by Article 7 of the law of the 4 germinal, year II, title II, to the boats below 100 tons, caught within *two myriameters* of the coasts, except in the case of *force majeure*, having on board prohibited merchandise.

¹ Translation. For the French text, see Léon Béquet, *Répertoire du droit administratif*, vol. 13, p. 208, note 1.

² Translation. For the French text, see J. B. Sirey, *Recueil général des lois et des arrêts en matière civile, criminelle, commerciale et de droit public*, vol. 1, pt. 2, p. 218.

³ Translation. For the French text, see Béquet, *ibid.*, vol. 13, p. 409.

1839, August 2.—Convention with Great Britain for defining and regulating the limits of the exclusive right of the oyster and other fisheries on the coasts of Great Britain and of France.¹

2. The oyster fishery within *three miles* of the island Jersey, calculated from low-water mark, shall be reserved exclusively to British subjects.

9. The subjects of Her Britannic Majesty shall enjoy the exclusive right of fishery within the distance of *three miles* from low-water mark, along the whole extent of the coasts of the British Islands; . . .

It is equally agreed, that the distance of *three miles* fixed as the general limit for the exclusive right of fishery upon the coasts of the two countries, shall, with respect to bays, the mouths of which do not exceed ten miles in width, be measured from a straight line drawn from headland to headland.

10. It is agreed and understood, that the miles mentioned in the present convention, are geographical miles, whereof sixty make a degree of latitude.

1843, May 24.—Regulations for the guidance of the fishermen of Great Britain and of France in the seas lying between the coasts of the two countries.²

2. The limits, within which the general right of fishery is exclusively reserved to the subjects of the two kingdoms respectively, are fixed (with the exception of those in Granville Bay) at *three miles* distance from low-water mark.

With respect to bays, the mouths of which do not exceed ten miles in width, the *three mile* distance is measured from a straight line drawn from headland to headland.

3. The miles mentioned in the present regulations are geographical miles, of which sixty make a degree of latitude.

1854, March 31.—Instructions addressed by the Minister of Marine and the Colonies to general naval officers, etc.³

ARTICLE 4. You will refrain from any act of hostility in the ports or in the territorial waters of neutral Powers, and you will consider

¹ *British and Foreign State Papers*, vol. 27, pp. 986, 988, 989.

² *Ibid.*, vol. 31, p. 166.

³ Translation. For the French text, see Théodore Ortolan, *Règles internationales et diplomatie de la mer* (1864), vol. 2, p. 450.

territorial waters as extending to *gun range* from low-water mark. . . .

1857, January 14.—*Convention with Great Britain relative to the rights of fishery on the coast of Newfoundland and the neighboring coasts.*¹

ARTICLE 1. French subjects shall have the exclusive right to fish, and to use the strand for fishery purposes, . . . Such exclusive fishing, from the Quirpon Islands to Cape Norman, shall extend to a distance of *three marine miles* due north from a straight line joining Cape Norman and Cape Bauld, and as regards the five harbors shall extend to within a radius of *three marine miles* in all directions from the center of each such harbor, but with power to the commissioners or umpire, elsewhere provided for in this convention, to alter such limits for each harbor, in accordance with the existing practice.

1859, August 2.—*Unratified treaty with Great Britain limiting fishery rights to a distance of three miles from the point of low tide along the entire length of the respective coasts.*²

1862, May 10.—*Decree of the French Emperor relative to coastal fishing.*³

ARTICLE 1. Fishing for all crustaceous and shell fish other than oysters, is allowed during the whole year at a distance of *three miles* from the low water mark.

Oyster fishing is allowed from September 1 until April 30, on the banks outside the bays or *three miles* from the coasts, with all decked boats or undecked boats without a fixed tonnage.

ARTICLE 2. On the demand of the fishermen's guild or their delegates, or, in default of this, of the seamen's syndic, certain fishing may be temporarily forbidden within an extent of *three miles* from the coast, if this measure is ordered in the interest of conservation of stock or to prevent the taking of migratory fish.

1867, November 11.—*Convention with Great Britain relative to fisheries in the seas between Great Britain and France.*⁴

ARTICLE 1. British fishermen shall enjoy the exclusive right of fishery within the distance of *three miles* from low-water mark, along the whole extent of the coasts of the British islands; . . .

¹ Hertslet, *Commercial Treaties*, vol. 10, p. 750.

² See Calvo, *ante*, p. 28. The provisions of this treaty are in force in British waters only. *Ibid.*

³ Translation. For the French text, see Hertslet, *ibid.*, vol. 13, p. 400.

⁴ *British and Foreign State Papers*, vol. 57, pp. 9, 10.

The distance of *three miles* fixed as the general limit for the exclusive right of fishery upon the coasts of the two countries shall, with respect to bays, the mouths of which do not exceed ten miles in width, be measured from a straight line drawn from headland to headland.

The miles mentioned in the present convention are geographical miles, whereof sixty make a degree of latitude.

1885, November 24.—Law prohibiting fishing privileges to foreigners in the territorial waters of Algeria and France, for a distance of three miles.¹

1886, November 27.—Treaty with Mexico of amity, commerce, and navigation.²

ARTICLE 15.

In all points concerning the policing of ports, the loading and unloading of vessels, and the protection of merchandise and goods, the subjects of the two Powers are subject to the local laws and ordinances.

For the Mexican ports the laws and ordinances promulgated or to be promulgated in the future by the federal Government are comprised in this designation, and furthermore the ordinances of the local authorities in the department of health.

The contracting parties agree to consider as the limit of territorial sovereignty on their respective coasts a distance of *twenty kilometers* from the line of lowest tide.

At all times this rule shall be applicable only for exercising customs control, for executing customs ordinances, and for the regulations against contraband, and shall never be applied, on the other hand, in all other questions of international maritime law. It is likewise understood that each of the contracting parties will apply said extent of the limit of sovereignty to the vessels of the other contracting party only provided that said contracting party acts likewise toward vessels of other nations with which it has made treaties of commerce and navigation.

¹ See Latour, *ante*, p. 253, note.

² Translation. For the French text, see Martens, *Nouveau recueil général des traités*, 2d series, vol. 15, p. 844.

1888, March 1.—*Law in regard to fishing in territorial waters.*¹

ARTICLE 1. Fishing is forbidden to foreign boats in the territorial waters of France and Algeria within a limit set at *three nautical miles* from low-water mark.

In the case of bays, the radius of *three miles* is measured from a straight line drawn across the bay in the part nearest the entrance at the first point where the opening does not exceed ten miles. In the several maritime districts, the line from which the limit is reckoned is established by decrees.²

1888, July 9.—*Decree fixing the limit of the bays of Algiers for purposes of measuring the three-mile zone of the French territorial sea.*³

ARTICLE 1. The straight lines drawn across the bays on the coast of Algiers from which the limit of three marine miles determining the French territorial sea, should be reckoned in accordance with Article 1 of the law of March 1, 1888,⁴ are traced as follows: . . .

1896, June 12.—*Decree regulating conditions of admission to, and sojourn at, the anchorages and ports of the French coast for ships, French and foreign, in time of war.*⁵

ARTICLE 1. In case of war no French ship of commerce and no foreign vessel of war or of commerce shall between sunrise and sunset approach the French coast (France and French possessions) to a distance less than *three miles*, unless authorized to do so. Between sunset and sunrise this prohibition relative to approaching to a distance of less than three miles is absolute. Between sunrise and sunset every vessel which is at a distance from shore at which the color of its flags can be distinguished should fly its national flag. If it desires to enter the interdicted zone, it will make the request to do so by hoisting the pilot's call signal; but it will remain outside of the *three mile* limit until hailed and interrogated, or until a semaphore has signaled to it that its request is granted. All ships are required to comply immediately with orders from a vessel of war or from a semaphore conveyed by means of the voice or by the signals of the international code.

¹ Translation. For the French text, see Hertslet, *Commercial Treaties*, vol. 18, p. 393.

² See decrees of July 18 and 9, 1888. The charts of the French hydrographic office and others on the same scale were used in fixing the line.

³ *Journal officiel*, July 13, 1888.

⁴ See *supra*.

⁵ Translation. For the French text, see *Revue générale de droit international public*, vol. 4, doc., p. 5.

1898.—*Definition of marginal sea as given in Block's Dictionary.*¹

Mer. 2. The sea may be regarded first of all in its relationship to the national dominions, whether it is a question of determining its shifting boundaries in law or of regulating the removal or disposition of the products obtained or drawn from its waters or gathered on its beaches.

The sea is considered a prolongation of the territory of each State to within a certain distance from the coast.

By virtue of a unanimous agreement this distance is limited by *the line where a cannon pointed seaward ceases to be effective.*

The border of the sea thus determined where each State exercises its jurisdiction and its police powers over fisheries, the supervision of navigation, etc., is called territorial waters.

1901.—*Instructions to naval officers to respect extent of neutral waters given as cannon range in 1870 and three miles in 1901.*²

1902, March 17.—*Decree promulgating the regulations for the conditions of entrance and sojourn of French and foreign vessels in the ports and anchorages of the French coast during the time of war.*³

ARTICLE 1. In time of war, between sunrise and sunset, no French ship of commerce, no foreign vessel of war or of commerce shall approach the French coasts (France or French possessions) to a distance of less than *three miles*, unless authorized to do so. Between sunset and sunrise, the interdiction to approach to a distance of less than three miles is absolute.—If it desires to enter the interdicted zone, it will make the request by hoisting the pilot's call signal; but it will remain outside of the *three-mile* limit until it has been hailed and interrogated, or until a semaphore has signaled that its request has been granted.

1909, July 19.—*Decree fixing a prohibited zone of 3 miles for the protection of the French coast in time of war.*⁴

No French ship of commerce, no foreign vessel of war or of commerce, shall, without exposing itself to destruction, approach the French coasts within an extent of *three miles*, before being authorized to do so.

¹ Translation. For the French text, see Maurice Block, *Dictionnaire de l'administration française*, 4th ed., pp. 1566, 1567.

² See Ræstad, *La mer territoriale*, p. 148, note 1.

³ Translation. For the French text, see *Revue générale de droit international public*, vol. 9, doc., p. 18.

⁴ Translation. For the French text, see *ibid.*, vol. 16, doc., p. 48.

. . . If it desires to enter the forbidden zone it will make the request by hoisting the pilot's call signal; but it will remain outside of the *three-mile* limit until admission has been granted. . . .

1911, September 23.—Decree making applicable to New Caledonia and its dependencies Articles 2–10 of the law of March 1, 1888, forbidding foreigners to fish in the territorial waters.¹

ARTICLE 2. The limit of the territorial waters is fixed by an imaginary line running out *three marine miles* from the great outer reefs and, where the reefs cease, *three marine miles* from the shore line at low tide.

1912, October 18.—Decree determining certain rules of neutrality in case of maritime war.²

ARTICLE 1. In case of war between two Powers in which the Government of the French Republic decides to observe neutrality, the following provisions will be applied to all ports, roads, and territorial waters belonging to the Republic or placed under its jurisdiction.

ARTICLE 2. For the application of the rules of the 13th Hague Convention, dated October 18, 1907:—French territorial waters extend out to a limit fixed at *six marine miles* (11,111 meters) into the offing from the shore line at low tide along the coasts and banks appearing above water, which belong thereto, as well as around the stationary buoys which fix the limit of the banks not appearing above water. For the bays a radius of 11 kilometers is measured from a straight line drawn across the bay at the first point nearest the mouth at which the opening does not exceed ten miles. If the distance from the coast or from the French banks at the point nearest the coasts or banks of another country is less than twenty-two kilometers, the French territorial waters extend to a point half-way between these coasts or banks and the French shore.

1912, December 19.—Instructions for the application of international law in case of war, addressed by the Minister of Marine to naval commanders.³

ARTICLE 5. *Respect of the rights of neutral states.*—22. You will strictly conform to the prohibitions imposed upon belligerents by

¹ Translation. For the French text, see *Revue général de droit international public*, vol. 20, doc., p. 41; *Journal officiel de la République française*, September 29, 1911, p. 7856.

² Translation. For the French text, see *Revue générale de droit international public*, vol. 20, doc., p. 6; *Journal officiel de la République française*, October 20, 21, 1912 (erratum).

³ Translation. For the French text, see U. S. Naval War College, *International Law Topics and Discussions*, 1913, p. 23.

Convention XIII of The Hague, of October 18, 1907, concerning the rights and duties of neutral Powers in case of naval war.

23. For the application of this convention, you will consider the territorial waters as never extending less than *three miles* from the coast, islands, or fringing banks appertaining thereto, counting from low-water mark, and never beyond the range of guns.

You will find in Annex II the table of Powers who, either in a text of law or regulations, or in a declaration of neutrality, have fixed the limit of their territorial waters, as regards the law of war, at a distance from the coast greater than *three miles*.

You will respect every limit of this nature found to have been thus regularly fixed before the opening of hostilities. . . .

TABLE OF STATES THAT HAVE FIXED AN EXTENT OF THEIR TERRITORIAL WATERS AT MORE THAN THREE MILES AS REGARDS THE LAW OF WAR.

| States. | Extent of their territorials. | Observations. |
|-----------|---|---|
| Russia. | Cannon range. | For the White Sea, the limit extends to <i>3 miles</i> , off the line joining Capes Sviatoi Noss and Kaninn Noss. |
| Sweden. | 4 miles, and, near a fortress, the cannon range from that fortress. | Beginning from the islet not submerged most distant from the shore. |
| Norway. | 4 miles. | Beginning from the unsubmerged islet most distant from the shore. |
| Denmark. | 4 miles. | |
| France. | 6 miles. | |
| Spain. | 6 miles. | |
| Portugal. | 6 miles. | |
| Italy. | Cannon range. | |

*1913, May 21.—A decree which governs during peace times visits of foreign war-ships to the anchorages and ports of the French coast lines and of countries under French protection.*¹

ARTICLE 3. In time of peace foreign war-ships are permanently authorized to visit French ports and ports of countries under French protection, to anchor in territorial waters at a distance less than *six miles* from the shore line at low tide, provided that there shall not be more than three such ships flying the same flag in one sector. Account will be kept of the ships already in a given sector in order to determine the number of ships that can be admitted thereto simultaneously. Notification of a projected visit should always be transmitted through the usual diplomatic channels in time enough to arrive at least seven days before the projected visit, if circumstances

¹ Translation. For the French text, see *Revue générale de droit international public*, vol. 20, doc., p. 54; *Journal officiel de la République française*, June 13, 1913, p. 5066, and June 14, 1913 [erratum], p. 5099.

permit it. Foreign war-ships shall not remain in the territorial ports and waters longer than 15 days. They are required to take to the high seas within six hours, if requested by the naval authorities or the commander at arms, even if the period stipulated for their stay has not expired.

1913, May 26.—Letter of the Minister of Marine to the President of the Republic.¹

REPORT TO THE PRESIDENT OF THE FRENCH REPUBLIC.

PARIS, *May 26, 1913.*

MR. PRESIDENT: The provisions of the decree of July 19, 1909, fix a uniform limit of *three miles* as a forbidden zone for the protection of the French coasts in time of war, and make conditions of admittance to the bases of fleet operations the same as to the ports of commerce. It seems necessary to me, in order to secure in the best way the safety of our large ports of war, to extend the forbidden zone to *six miles* in the offing where they face the sea, thus making it conform to the range of modern guns.

1913, May 26.—Decree governing, during war time, the conditions of admission and sojourn of vessels other than French war-ships in the anchorages and ports of the coast line of France and of countries under French protection.²

The President of the French Republic: In view of the decree of July 19, 1909, governing in war time conditions of admission and sojourn of vessels other than French war-ships in the anchorages and ports of the coast line of France;—On the report of the Minister of the Marine;—Decrees:

ARTICLE 1. In time of war conditions of admission and of sojourn of vessels other than French war-ships in the anchorages and ports of the coast line of France and of countries under French protection are governed by the provisions made in the following articles:—

ARTICLE 2. No French vessel of commerce or foreign vessel of war or commerce shall, without incurring the danger of destruction, approach within *three miles* of the coast in the territorial waters of France or of countries under French protection without obtaining due permission to do so. Said zone is extended to *six miles* from the coast in the offing where the bases of fleet operations are located, to

¹ Translation. For the French text, see U. S. Naval War College, *International Law Topics and Discussions*, 1914, p. 52; *Revue générale de droit international public*, vol. 21, doc., p. 56; also *Journal officiel de la République française*, 14 juin, 1913, p. 5097; 18 juin, p. 5234.

² Translation. For the French text, see *Revue générale de droit international public*, vol. 20, doc., p. 57, *Journal officiel de la République française*, June 14, 1913, p. 5097, and June 18, 1913 [erratum], p. 5234.

the limits fixed below in each case: Cherbourg: from the meridian of Cape Levi to the meridian of the point of Jardehen; Brest; from the parallel of the lighthouse of Le Four to the parallel of the Pointe du Raz: Toulon: from the meridian of the Bec de l'Aigle to the meridian of Cape Bénat; Bizerte: from the meridian of the Raz Enghela to the meridian of Cape Zébib.

GERMANY¹

*1868, November.—British notice to the fishermen fishing off the coasts of North Germany, establishing the zone reserved for nationals at three marine miles.*²

*1874, December.—British notice to fishermen fishing off the coasts of the German Empire establishing the zone reserved for nationals at three miles.*³

*1882, December 5.—Treaty of friendship, commerce, and navigation, with Mexico.*⁴

VIII.

The two Contracting Parties agree to consider as the limit of maritime jurisdiction on their coasts, the distance of *3 sea leagues*, reckoned from low-water mark. Nevertheless, this stipulation shall not have effect except as regards the coast-guard and custom-house service, and the measures for preventing contraband trade. As regards all other questions of international law it shall have no application. It is, however, to be understood that the aforesaid extension of maritime jurisdiction shall not be made applicable by one of the Contracting Parties as against the vessels of the other, unless that party shall treat in the same manner the vessels of all other nations with which it may have treaties of commerce and navigation.

*1892, July 19.—Commercial convention with Egypt.*⁵

XX. In case of suspicions of contraband the Egyptian customs officers may board and seize any vessel of less than two hundred tons burden within a radius of *ten kilometers* of the coast outside the waters of an Egyptian port; besides, any German vessel of less than two hundred tons burden may be stopped and seized outside of that distance if the pursuit has been commenced within a radius of *ten kilometers* of the coast.

¹ See also Prussia.

² See *post*, p. 555.

³ See *post*, p. 558.

⁴ Translation. *British and Foreign State Papers*, vol. 78, p. 711.

⁵ *Ibid.*, vol. 84, p. 175.

1909, September 30.—*Naval prize regulations*.¹

3. The right of capture is not to be exercised—

(a) Within neutral territorial waters, *i. e.*, within the sea area *3 nautical miles* in breadth from the coast line at low water, extending along the coast and the islands and bays belonging thereto. The following are considered as belonging to this area: islands not more than *6 nautical miles* distant from a mainland coast of the same State, and any bay, the coast of which is exclusively in the possession of neutral States and which is not more than *6 nautical miles* wide at the opening.

(b) Within those waters which are by treaty closed to the operations of war or to warships. These are:

(1) The Suez Canal, including the ports at its approaches and a stretch of sea *3 nautical miles* from the latter (Article IV, paragraph 1, of the Treaty of Constantinople, October 29, 1888).

(2) The Bosphorus and the Dardanelles, provided Turkey is not itself a belligerent (London Convention *re* the Narrow Straits of July 13, 1841; Article X of the Treaty of Paris of March 30, 1856, and Appendix 1 thereto; Article II of the Treaty of London, March 13, 1871; Article LXIII of the Treaty of Berlin, July 13, 1878).

(3) The waters of Corfu and Paxo, provided no other Powers except Greece, Great Britain, France, Russia, Austria-Hungary, and Germany are taking part in the war (Article II of the Treaty of London, March 29, 1864, and Article II of the Treaty of London, November 14, 1863).

(4) The mouths of the Danube (Article LII of the Treaty of Berlin, July 13, 1878).

(5) The mouths of the Congo and Niger and the portions of the territorial waters adjoining them (General Act of the Berlin Conference, February 26, 1885, Articles XXV and XXXIII).

The right of capture can no longer be exercised if a merchant ship reaches waters mentioned under (a) and (b), even while being chased or stopped and searched.

A ship seized under violation of the above provisions is to be immediately released, particularly at the request of the neutral Government.

GREAT BRITAIN

1667, May 23.—*Treaty of commerce and alliance with Spain*.²

XIV. And if any ship or ships belonging to the subjects and merchants of the one or the other, entering into bays or in the open sea,

¹ Translation. *British and Foreign State Papers*, vol. 107, p. 833. For the original text, see *Reichsgesetzblatt*, No. 50, of 1914.

² *British and Foreign State Papers*, vol. 1, pt. 1, p. 569.

shall be encountered by the ships of the said kings or of privateers, their subjects, the said ships, to prevent all disorders, shall not come within *cannon shot*, but shall send their long-boat or pinnance to the merchant ship, and only two or three men on board, to whom the master or owner shall show his passports and sea letters, . . .

1676, March 5.—*Treaty of peace and commerce with Tripoli.*¹

ARTICLE VIII. That none of the ships or other smaller vessels of Tripoli shall remain cruising near His Majesty's city and garrison of Tangier, or *in sight* of it, nor other way disturb the peace and commerce of that place.

1682, April 10.—*Treaty of peace and commerce with Algiers.*²

ARTICLE VIII. That none of the ships or other smaller vessels of Algiers shall remain cruising near or *in sight* of His Majesty's city and garrison of Tangier, or of any other of His Majesty's roads, havens, or ports, towns, and places, nor any ways disturb the peace and commerce of the same.

1686, April 5.—*Treaty of peace and commerce with Algiers.*³

ARTICLE VIII. That none of the ships, or other smaller vessels of Algiers, shall remain cruising near or *in sight* of any of His Majesty's roads, havens, or ports, towns, and places, nor any way disturb the peace and commerce of the same.

1691, December 8/18.—*Treaty with the Netherlands and Denmark and Norway, wherein the latter promises her protection to the ships of the subjects of the two Powers within sight of her dominions.*⁴

1700, August 17.—*Treaty of peace and commerce with Algiers.*⁵

ARTICLE I. We the most excellent and most illustrious Lords, Mustapha Dey, Ali Bashaw, and Mustapha Aga, Governors of the most famous and warlike city and Kingdom of Algier, by these presents do renew and confirm the peace we so happily enjoy with the King of Great Britain, France, and Ireland, defender of the Christian faith, and his subjects, made in the year 1682, in every part and article, more particularly that of the VIIIth, wherein it is expressed, that no ship or vessel belonging to our Government of Algier shall cruise

¹ *British and Foreign State Papers*, vol. 1, pt. 1, p. 715.

² *Ibid.*, p. 356.

³ *Ibid.*, p. 382.

⁴ See *ante*, p. 518.

⁵ *British and Foreign State Papers*, vol. 1, pt. 1, p. 365.

near or *in sight* of any of the roads, havens, or ports, towns or places belonging to the said King of Great Britain, or any way disturb the peace and commerce of the same: and in compliance with the VIIIth article of that Treaty, we do sincerely promise and declare, that such orders shall for the future be given to all our commanders, that, under a severe punishment, and our utmost displeasure, they shall not enter into the channel of England, nor come to cruise, nor shall come *in sight* of any port of His Majesty of Great Britain's dominions any more for the time to come.

1716, July 19.—*Treaty of peace with Tripoli.*¹

ARTICLE XXIV. And whereas in the treaty of peace concluded in the reign of King Charles II, in the year 1676, by Sir John Narbrough, Knight, an article was inserted, by which the ships and vessels of Tripoli were not permitted to cruise before, or *in sight* of the port of Tangier, then belonging to Great Britain; now it is hereby concluded and ratified, that in the same manner none of the ships or vessels belonging to Tripoli, shall cruise or look for prizes, before or in sight of the ports of the island of Minorca, and the city of Gibraltar, to disturb or molest the trade thereof in any manner whatsoever.

1716, August 30.—*Treaty with Tunis.*²

ARTICLE XI. . . . it is hereby agreed and concluded by the parties before mentioned, that none of the ships and vessels belonging to Tunis or the dominions thereof, shall be permitted to cruise, or look for prizes of any nation whatsoever, before or *in sight* of the aforesaid city of Gibraltar . . . and if any prize shall be taken by the ships or vessels of Tunis, within the space of *ten miles* of the aforesaid places, she shall be restored without any contradiction.

1736.—*An Act for indemnifying persons who have been guilty of offenses against the laws made for securing the revenues of customs and excise, and for enforcing those laws for the future.*³

XVIII. And be it further enacted by the authority aforesaid, That upon information to be given upon oath before any one or more of his Majesty's justices of the peace in any county, city, or liberty whatsoever, that any person or persons are or shall be lurking, waiting, or loitering within *five miles* from the sea coast, or from any

¹ *British and Foreign State Papers*, vol. 1, pt. 1, p. 724.

² *Ibid.*, p. 787.

³ *North Atlantic Coast Fisheries Arbitration* (U. S. Sen. Doc. No. 870, 61st Cong., 3d sess.), vol. 5, p. 887; 9 George II, cap. 35.

navigable river, and that there is reason to suspect that they wait with intent to be aiding and assisting in the running, landing, or carrying away, any prohibited or uncustomed goods, it shall and may be lawful to and for every such justice or justices to cause all such persons to come and be brought before him or them, and to grant his or their warrant or warrants for the apprehending such offender, and bringing him or them before any of his Majesty's said justices of the peace;

XXII. And be it further enacted by the authority aforesaid, That from and after the twenty-fourth day of June, one thousand seven hundred and thirty-six, where any ship or vessel whatsoever coming or arriving from foreign parts, and having on board six pounds of tea, or any foreign brandy, arrack, rum, strong waters, or other spirits whatsoever, in casks under sixty gallons (except only for the use of the seamen then belonging to and on board such ship or vessel, not exceeding two gallons for each seaman), shall be found at anchor, or hovering within the limits of any of the ports of this kingdom, or within *two leagues* of the shore, or shall be discovered to have been within the limits of any port, and not proceeding on her voyage, wind and weather permitting (unless in case of unavoidable necessity, and distress of weather . . . all such tea, foreign brandy, arrack, rum, strong waters and spirits, together with the chests, boxes, casks, and other package whatsoever, containing the same goods, or the value thereof, shall be forfeited and lost, . . .

. . . be it further enacted by the authority aforesaid, That in case any foreign goods, wares, or merchandise, shall after the twenty-ninth day of September, one thousand seven hundred and thirty-six, by any ship, boat, or vessel whatsoever, be taken in at sea, or put out of any ship or vessel whatsoever, within the distance of *four leagues* from any of the coasts of this kingdom (whether the same be within or without the limits of any of the ports thereof) without payment of the customs and other duties due and payable for the same, . . . such goods, wares, and merchandises, shall be forfeited and lost, and the master or other person having charge of such ship, vessel, or boat so taking in the same, and all such persons who shall be aiding, assisting, or otherwise concerned in the unshipping or receiving of the said goods, wares, or merchandises, shall forfeit treble the value thereof. . . .

1751, September 19.—*Treaty of peace with Tripoli*.¹

ARTICLE XXI. That whereas the island of Minorca in the Mediterranean Sea, and the city of Gibraltar in Spain, do now belong to

¹ *British and Foreign State Papers*, vol. 1, pt. 1, p. 728.

His Majesty the King of Great Britain; it is therefore hereby agreed, that from this time forward, for ever, the said island of Minorca and city of Gibraltar shall be esteemed, in every respect, by the Bashaw and Government of Tripoli to be part of His Britannic Majesty's own dominions, and the inhabitants thereof shall be looked upon as His Majesty's natural subjects, in the same manner as if they had been born in any part of Great Britain; and they, with their ships and vessels wearing British colors, and being furnished with Mediterranean passes, shall be permitted freely to trade and traffic in any part of the Kingdom of Tripoli, or dominions thereunto belonging, and shall pass, without any molestation whatsoever, either on the seas or elsewhere, in the same manner, and with the same freedom and privileges as have been stipulated in this and all former treaties, in behalf of the British nation and subjects; and that none of the ships or vessels belonging to Tripoli shall cruise or look for prizes before or *in sight* of the ports of the island of Minorca and the city of Gibraltar, to disturb or molest the trade thereof in any manner whatsoever.

1751, October 19.—*Treaty of peace and commerce with Tunis.*¹

ARTICLE 11. That the better and more firmly to maintain the good correspondence and friendship that have been so long and happily established between the Crown of Great Britain, and the Government of Tunis, it is hereby agreed and concluded by the parties before mentioned, that none of the ships and vessels belonging to Tunis, or the dominions thereof, shall be permitted to cruise or look for prizes, of any nature whatsoever, before, or *in sight* of the aforesaid city of Gibraltar, or any of the ports in the island of Minorca, to hinder or molest any vessels bringing provisions and refreshments for His Britannic Majesty's troops and garrisons in those places, or to give any disturbance to the trade and commerce thereof: and if any prize shall be taken by the ships or vessels of Tunis, within the space of *ten miles* of the aforesaid places, she shall be restored without any contradiction.

1762, May 14.—*Treaty of peace and commerce with Algiers.*²

ARTICLE II. It is also agreed that if any ships or vessels of Christian nations, in enmity with the King of Great Britain, &c., shall, at time hereafter be met with or found upon the coast of the Kingdom of Algiers, either at anchor or otherwise, and not within the *reach of cannon shot* of the shore, that it shall and may be lawful

¹ *British and Foreign State Papers*, vol. 1, pt. 1, p. 741.

² *Ibid.*, p. 372.

for any of His Britannic Majesty's ships or vessels of war, or any English privateers, or letters of marque, to take and seize as prizes, any such ships or vessels so met with or found, as aforesaid: and shall also be suffered to bring the said prizes into any port, road, or harbor of the Kingdom of Algiers; and to dispose of the whole or any part thereof, or otherwise to depart with such captures, without the least hindrance or molestation.

1762, June 22.—Treaty of peace and commerce with Tunis.¹

ARTICLE III. That if any ships or vessels of Christian nations in enmity with the King of Great Britain, &c., shall at any time hereafter be met with, or found upon the coast of the Kingdom of Tunis, either at anchor or otherwise, and not within the *reach of cannon shot* of the shore, that it shall and may be lawful for any of His Britannic Majesty's ships or vessels of war, or any English privateers, or letter of marque, to take and seize as prizes any such ships or vessels so met with, or found as aforesaid; and shall also be suffered to bring the said prizes into any port, road, or harbor, of the Kingdom of Tunis: and to dispose of the whole or any part thereof, or otherwise to depart with such captures, without the least hindrance or molestation whatsoever.

1763.—An Act for granting certain duties in the British colonies and plantations in America; for continuing, amending, and making perpetual an Act passed in the sixth year of the reign of his late Majesty King George the Second (intituled, An Act for the better securing and encouraging the trade of His Majesty's sugar colonies in America); for applying the produce of such duties and of the duties to arise by virtue of the said Act, toward defraying the expenses of defending, protecting, and securing the said colonies and plantations; for explaining an Act made in the twenty-fifth year of the reign of King Charles the Second (intituled, An Act for the encouragement of the Greenland and Eastland trades, and for the better securing the plantation trade); and for altering and disallowing several drawbacks on exports from this Kingdom, and more effectually preventing the clandestine conveyance of goods to and from the said colonies and plantations, and improving and securing the trade between the same and Great Britain.² (To take effect September 29, 1764.)

XXXIII. And whereas by an act of Parliament, made in the ninth year of the reign of his late Majesty King George the Second, intituled, An Act for indemnifying persons who have been guilty of offences against the laws made for securing the revenue of customs

¹ *British and Foreign State Papers*, vol. 1, pt. 1, p. 744.

² *North Atlantic Coast Fisheries Arbitration* (U. S. Sen. Doc. No. 870, 61st Cong., 3d sess.), vol. 5, p. 889; 4 George III, cap. 15.

and excise, and for the enforcing those laws for the future, and by other acts of Parliament since made, which are now in force, in order to prevent the clandestine landing of goods in this kingdom from vessels which hover upon the coasts thereof, several goods and vessels, in those laws particularly mentioned and described, are declared to be forfeited, if such vessels are found at anchor, or hovering within *two leagues* of the shore of this kingdom, without being compelled thereto by necessity or distress of weather; . . . be it enacted by the authority aforesaid, that from and after the twenty-ninth day of September, one thousand seven hundred and sixty-four, if any foreign ship or vessel whatsoever shall be found at anchor, or hovering within *two leagues* of the shore of any land, island, plantation, colony, territory or place, which shall or may be in the possession or under the dominion of his Majesty, his heirs or successors, in America, and shall not depart from the coast, and proceed upon her voyage to some foreign port or place, within forty-eight hours after the master or other person taking the charge of such ship or vessel shall be required so to do by any officer of his Majesty's customs, . . .

. . . it is hereby further enacted by the authority aforesaid, That from and after the twenty-ninth day of September, one thousand seven hundred and sixty-four, if any British ship or vessel shall be found standing into, or coming out from, either of those islands, or hovering or at anchor within *two leagues* of the coast thereof, or shall be discovered to have taken any goods or merchandizes on board at either of them, or to have been there for that purpose; such ship or vessel, and all the goods so taken on board there, shall be forfeited and lost, and shall and may be seized and prosecuted by any officer of His Majesty's customs; . . .

1763, February 10.—Definitive treaty of peace with France, fixing a prohibited zone of three leagues from all coasts belonging to Great Britain.¹

1783, September 3.—Definitive treaty of peace with the United States comprehending all islands within twenty leagues of any part of the shores of the United States.²

1784, October 1.—An Act for the more effectual prevention of smuggling in this Kingdom.³

. . . from and after the first day of October, one thousand seven hundred and eighty-four, if any ship or vessel shall be found at

¹ See *ante*, p. 539.

² See *ante*, p. 631.

³ 24 George III, cap. 47.

anchor, or hovering within the limits of any of the ports of this kingdom, or within *four leagues* of the coast thereof, or shall be discovered to have been within the said limits or distance. . . . having on board any goods whatsoever, liable to forfeiture, by any act of parliament, upon being imported into Great Britain, then not only all such goods, but also the ship or vessel on board which they shall be found as aforesaid, with all her guns, furniture, ammunition, tackle, and apparel, shall be forfeited.

*1786, September 26.—Treaty of navigation and commerce with France, establishing cannon range as the extent of the neutral zone.*¹

*1790, October 28.—Convention with Spain relative to America.*²

IV. His Britannic Majesty engages to take the most effectual measures to prevent the navigation and fisheries of his subjects in the Pacific Ocean, or in the South Seas, from being made a pretext for illicit trade with the Spanish settlements; and, with this view, it is moreover expressly stipulated that British subjects shall not navigate, or carry on their fishery in the said seas, within the space of *ten sea leagues* from any part of the coasts already occupied by Spain.

*1794, November 19.—Treaty of amity, commerce, and navigation with the United States, giving cannon range as the extent of the neutral zone.*³

*1800, July 29, and 1801, November 27.—The cases of the “Twee Gebroeders.”*⁴

Sir W. Scott. . . . On this point I am inclined to think, on an inspection of the charts, and on hearing what has been urged, that she was lying within the limits to which neutrality immunity is usually conceded. She was lying in the eastern branch of the Eems, within what may, I think, be considered as a distance of *three miles*, at most, from East Friesland. An exact measurement can not easily be obtained; but in a case of this nature, in which the court would not willingly act with an unfavorable minuteness towards a neutral state, it will be disposed to calculate the distance very liberally; and more especially, as the spot in question is a sand covered with water only on the flow of the tide, but immediately connected with the land of East Friesland, and when dry may be considered as making part of it. I am of opinion that the ship was lying within those limits in which all

¹ See *ante*, p. 521.

² *British and Foreign State Papers*, vol. 1. pt. 1. p. 666.

³ See *post*, p. 637.

⁴ 3 C. Robinson, pp. 163, 336.

direct hostile operations are by the law of nations forbidden to be exercised.

[In the second case.]

Strictly speaking, the nature of the claim brought forward on this occasion is against the general inclination of the law, for it is a claim of private and exclusive property, on a subject where a general, or at least a common use is to be presumed. It is a claim which can only arise on portions of the sea, or on rivers flowing through different states. The law of rivers flowing entirely through the provinces of one State is perfectly clear. In the sea, out of the *reach of cannon shot*, universal use is presumed.

1802, June 22.—*An Act to alter, amend and render more effectual an Act, made in the twenty-fourth year of the reign of his present Majesty, for the more effectual prevention of smuggling in Great Britain.*¹

. . . That, from and after the passing of this act, every ship, vessel, and boat described in the said recited act, or any other act or acts passed for the extending the provisions thereof, or for the better prevention of smuggling, and which would, under and by virtue of any of the provisions of the said recited act, or any other such act or acts as aforesaid in force on and immediately before the passing of this act, be subject and liable to forfeiture for hovering, or being found or discovered to have been within *four leagues* of the coast of Great Britain, shall, together with all goods laden on board, and the guns, furniture, ammunition, tackle, and apparel, be subject and liable to forfeiture if hovering, or found or discovered to have been within *eight leagues* of the coast of Great Britain, under any of the circumstances in the said recited act, or any other such act or acts as aforesaid, specified, described, or mentioned; . . .

1805, November 6, 15 and 20.—*The Case of "The Anna."*²

This was the case of a ship under American colors, with a cargo of logwood, and about 13,000 dollars on board, bound from the Spanish main to New Orleans, and captured by the *Minerva* privateer near the mouth of the river Mississippi. A claim was given under the direction of the American Ambassador (Minister) for the ship and cargo, "as taken within the territory of the United States, at the distance of a mile and a half from the western shore of the prin-

¹ 42 George III, cap. 82.

² 5 C. Robinson, p. 378; Evans, *Cases*, p. 65.

cipal entrance of the Mississippi, and within view of a post protected by a gun, and where is stationed an officer of the United States."

SIR WILLIAM SCOTT (LORD STOWELL): . . .

When the ship was brought into this country a claim was given of a grave nature, alleging a violation of the territory of the United States of America. This great leading fact has very properly been made a matter of much discussion, and charts have been laid before the court to show the place of capture, though with different representations from the adverse parties. The capture was made, it seems, at the mouth of the river Mississippi, and, as it is contended in the claim, within the boundaries of the United States. We all know that the rule of law on this subject is "*terrae dominium finitur, ubi finitur armorum vis*," and since the introduction of firearms that distance has usually been recognized to be about *three miles* from the shore. But it so happens in this case that a question arises as to what is to be deemed the shore, since there are a number of little mud islands composed of earth and trees drifted down by the river, which forms a kind of portico to the mainland. It is contended that these are not to be considered as any part of the territory of America; that they are a sort of "no man's land," not of consistency enough to support the purposes of life, uninhabited, and resorted to only for shooting and taking birds' nests. It is argued that the line of territory is to be taken only from the Balize, which is a fort raised on made land by the former Spanish possessors. I am of a different opinion; I think that the protection of territory is to be reckoned from these islands; and that they are the natural appendages of the coast on which they bordered, and from which, indeed, they are formed. Their elements are derived immediately from the territory, and on the principle of alluvium and increment, on which so much is to be found in the book of law, *Quod vis fluminis de tuo prædio detraxerit, & vicino prædio attulerit, palam tuum remanet* (inst. L. 2. Tit. 1, § 21), even if it had been carried over to an adjoining territory. Consider what the consequence would be if lands of this description were not considered as appendent to the mainland, and as comprised within the bounds of territory. If they do not belong to the United States of America, any other power might occupy them; they might be embanked and fortified. What a thorn would this be in the side of America. It is physically possible at least that they might be so occupied by European nations, and then the command of the river would be no longer in America, but in such settlement. The possibility of such a consequence is enough to expose the fallacy of any arguments that are addressed to show that these islands are not to be considered as part of the territory of America. Whether

they are composed of earth or solid rock, will not vary the right of dominion, for the right of dominion does not depend upon the texture of the soil.

I am of opinion that the right of territory is to be reckoned from those islands. That being established, it is not denied that the actual capture took place within the distance of three miles from the islands, and at the very threshold of the river. But it is said that the act of capture is to be carried back to the commencement of the pursuit, and that if a contest begins before, it is lawful for a belligerent cruiser to follow, and to seize his prize within the territory of a neutral State. And the authority of Bynkershoek is cited on this point. True it is, that that great man does intimate an opinion of his own to that effect; but with many qualifications, and as an opinion, which he did not find to have been adopted by any other writers. I confess I should have been inclined to have gone along with him, to this extent, that if a cruiser, which had before acted in a manner entirely unexceptionable, and free from all violation of territory, had summoned a vessel to submit to examination and search, and that vessel had fled to such places as these, entirely uninhabited; and the cruiser had without injury or annoyance to any person whatever, quietly taken possession of his prey, it would be stretching the point too hardly against the captor to say that on this account only it should be held an illegal capture. If nothing objectionable had appeared in the conduct of the captors before, the mere following to such a place as this is, would, I think, not invalidate a seizure otherwise just and lawful.

But that brings me to a part of the case, on which I am of opinion that the privateer had laid herself open to great reprehension. Captors must understand that they are not to station themselves in the mouth of a neutral river, for the purpose of exercising the rights of war from that river, much less in the very river itself. It appears from the privateer's own logbook that this vessel has done both; and as to any attempt to shelter this conduct under the example of King's ships, which I do not believe, and which, if true, would be no justification to others, captors must, I say, be admonished that the practice is altogether indefensible, and that if King's ships should be guilty of such misconduct, they would be as much subject to censure as other cruisers. It is unnecessary to go over all the entries in the log. The captors appear by their own description *to have been standing off and on*, obtaining information at the Balize, overhauling vessels in their course down the river, and making the river as much subservient to the purposes of war as if it had been a river of their own country. This is an inconvenience which the States of America are called upon to resist, and which this Court is bound on every principle to discourage and correct. . . .

The conduct of the captors has on all points been highly reprehensible. Looking to all the circumstances of previous misconduct, I feel myself bound to pronounce that there has been a violation of territory, and that as to the question of property, there was not sufficient ground of seizure; and that these acts of misconduct have been further aggravated by bringing the vessel to England, without any necessity that can justify such a measure. In such a case it would be falling short of the justice due to the violated rights of America, and to the individuals who have sustained injury by such misconduct, if I did not follow up the restitution which has passed on the former day with a decree of costs and damages.

1806, December 31.—Unconfirmed treaty of amity, commerce, and navigation, with the United States establishing a neutral zone of cannon range or three marine miles.¹

1811, March 9.—Schedule annexed to the regulations and ordinances of Ceylon.²

Vessels navigating the inner or alongshore passage are not to hover or anchor in deeper than *four fathoms water*.

Vessels navigating the outer passage are not to hover or anchor within *twelve fathoms water*.

1818, October 20.—Convention with the United States respecting fisheries, boundary, and the restoration of slaves, reserving a zone of three marine miles for the nationals.³

1819, June 14.—Act of the British Parliament, to enable His Majesty to make regulations with respect to the taking and curing of fish on certain parts of the coasts of Newfoundland, Labrador, and His Majesty's other possessions in North America, according to a convention made between His Majesty and the United States of America.⁴

II. And be it further enacted, that from and after the passing of this act it shall not be lawful for any person or persons, not being a

¹ See *post*, p. 642.

² Fur Seal Arbitration, *Proceedings of the Tribunal of Arbitration at Paris, 1893*, vol. 2, p. 461.

³ See *post*, p. 646.

⁴ Hertslet, *Commercial Treaties*, vol. 4, p. 491.

natural-born subject of His Majesty, in any foreign ship, vessel, or boat, nor for any person in any ship, vessel, or boat, other than such as shall be navigated according to the laws of the United Kingdom of Great Britain and Ireland, to fish for, or to take, dry, or cure any fish of any kind whatever, within *three marine miles* of any coasts, bays, creeks, or harbors whatever, in any part of His Majesty's dominions in America, not included within the limits specified and described in the 1st article of the said convention, . . .

1825, June 27.—An Act to repeal the several laws relating to the performance of quarantine, and to make other provisions in lieu thereof.¹

IX. And be it further enacted, That every commander, master, or other person having the charge of any vessel on board whereof the plague or other infectious disease or distemper highly dangerous to the health of His Majesty's subjects shall actually be, shall be and is hereby required at all times when such vessel shall meet with any other vessel at sea, or shall be within *two leagues* of the coast of the United Kingdom, or the islands of Guernsey, Jersey, Alderney, Sark, or Man, to hoist a signal to denote that his vessel has the plague or other infectious disease or distemper highly dangerous to the health of His Majesty's subjects actually on board thereof, . . . on failure thereof such commander, master, or other person having charge of such vessel shall forfeit and pay for every such offence the sum of one hundred pounds.

*1833, August 28.—An Act for the general regulation of the customs.**

Be it therefore enacted, That no goods shall be unladen from any ship arriving from parts beyond the seas at any port or place in the United Kingdom or in the Isle of Man, nor shall bulk be broken after the arrival of such ship within *four leagues* of the coasts thereof respectively, before due report of such ship and due entry of such goods shall have been made, and warrant granted, in manner hereinafter directed: . . .

¹ 6 George IV, cap. 78.

² 3 and 4 William IV, cap. 52.

*1833, December 9.—British Order in Council, appointing a court of justice at Canton, for the trial of offenses committed by British subjects in China.*¹

Whereas by a certain act of Parliament, made and passed in the 3rd and 4th year of His Majesty's reign, entitled "An Act to regulate the trade to China and India," it is, amongst other things, enacted, that it shall and may be lawful for His Majesty, by any such order or orders as to His Majesty in Council shall appear expedient and salutary, to create a court of justice, with criminal and admiralty jurisdiction, for the trial of offences committed by His Majesty's subjects within the dominions of the Emperor of China, and the ports and havens thereof, and on the high seas within *one hundred miles* of the coast of China, and to appoint one of the superintendents in the said act mentioned to be the officer to hold such court, and other officers for executing the process thereof; now, therefore, in pursuance of the said act, and in execution of the powers thereby in His Majesty in Council in that behalf vested, it is hereby ordered by His Majesty, by and with the advice of his Privy Council, that there shall be a court of justice, with criminal and admiralty jurisdiction, for the purposes aforesaid which court shall be holden at Canton, in the said dominions, or on board any British ship or vessel in the port or harbor of Canton, and that the said court shall be holden by the chief superintendent for the time being, appointed, or to be appointed, by His Majesty, under and in pursuance of said act of Parliament: . . .

*1836, March 12.—An Act relating to the fisheries, and for the prevention of illicit trade in the Province of Nova Scotia, and the coasts and harbors thereof.*²

I. Be it therefore enacted, by the Lieutenant Governor, Council and Assembly, That, from and after the passing of this act, it shall be lawful for the officers of His Majesty's customs, the officers of impost and excise, the sheriffs and magistrates throughout this Province, and any person holding a commission for that purpose from his Excellency the Lieutenant Governor for the time being, to go on board any ship, vessel, or boat, within any port, bay, creek, or harbor, in this Province; and also, to go on board any ship, vessel, or boat, hovering within *three marine miles* of any of the coasts, bays,

¹ *British and Foreign State Papers*, vol. 20, p. 262.

² *North Atlantic Coast Fisheries Arbitration* (U. S. Sen. Doc. No. 870, 61st Cong., 3d sess.), vol. 5, p. 1033; Statute of Nova Scotia, 6 William IV, cap. 8.

creeks, or harbors thereof, and in either case freely to stay on board such ship, vessel, or boat, as long as she shall remain within such port or distance, and if any such ship, vessel, or boat, be bound elsewhere, and shall continue so hovering for the space of twenty-four hours, after the master shall have been required to depart, it shall be lawful for any of the above enumerated officers or persons to bring such ship, vessel, or boat into port, and to search and examine her cargo, and to examine the master upon oath, touching the cargo and voyage, and if there be any goods on board prohibited to be imported into this Province, such ship, vessel, or boat, and the cargo laden on board thereof shall be forfeited, and if the said ship, vessel, or boat shall be foreign, and not navigated according to the laws of Great Britain and Ireland, and shall have been found fishing, or preparing to fish, or to have been fishing, within such distance of such coasts, bays, creeks, or harbors of this Province, such ship, vessel, or boat, and their respective cargoes, shall be forfeited; and if the master or person in command thereof shall not truly answer the questions which shall be demanded of him in such examination, he shall forfeit the sum of one hundred pounds.

1839, August 2.—*Convention with France for defining and regulating the limits of exclusive right of the oyster and other fishery on the coasts of Great Britain and of France at three marine miles.*¹

1842, July 3.—*Treaty with Portugal for the suppression of traffic in slaves.*²

ARTICLE III (4). It shall not be lawful to visit or detain, under any pretext or motive whatever, any merchant vessel when at anchor in any port or roadstead belonging to either of the two high contracting parties, or within *cannon shot* of the batteries on shore unless on a written demand for cooperation on the part of the authorities of such country; . . .

1843, April 15.—*Act of the council and assembly of Prince Edward Island relative to the American right of fishery under the Convention of illicit trade in the Province of Nova Scotia, and the America.*³

. . . And whereas the United States did, by said convention renounce forever any liberty enjoyed or claimed by the inhabitants thereof to take, dry, or cure fish on or within *three marine miles* of any of the coasts, bays, creeks, or harbors of His Britannic Ma-

¹ See *ante*, p. 547.

² *British and Foreign State Papers*, vol. 30, p. 533.

³ Hertslet, *Commercial Treaties*, vol. 10, p. 637. Confirmed by Order in Council, September 3. 1844.

jesty's dominions in America, not included within the above-mentioned limits . . .

Be it therefore enacted . . . that it shall be lawful for the officers of Her Majesty's customs . . . to go on board any ship . . . hovering within *three marine miles* of any of the coasts, bays, creeks, or harbors thereof . . .

*1843, May 24.—Regulations for the guidance of the fishermen of Great Britain and of France in the seas lying between the coasts of the two countries within the extent of three miles from low-water mark.*¹

*1843, August 22.—Act of the British Parliament “for the better government of Her Majesty's subjects resorting to China.”*²

. . . be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that it shall be lawful for Her Majesty, by any commission or commissions under the great seal of the United Kingdom, or by any instructions under Her Majesty's signet and sign manual accompanying and referred to in any such commission or commissions, to authorize the superintendent of the trade of Her Majesty's subjects in China (so long as such superintendent shall also be governor of the said island of Hong Kong) to enact, with the advice of the legislative council of the said island of Hong Kong, all such laws and ordinances as may from time to time be required for the peace, order, and good government of Her Majesty's subjects being within the dominions of the Emperor of China, or being within any ship or vessel at a distance of not more than *one hundred miles* from the coast of China, and to enforce the execution of such laws and ordinances by such penalties and forfeitures as to him, by the advice aforesaid, shall seem fit; . . .

*1843, November 30.—An ordinance to declare illegal the possession of certain nets and instruments within certain limits.*³

C. Campbell.

Whereas it is expedient to prohibit the possession within certain limits of certain nets and instruments which might otherwise be used to the detriment of Her Majesty's pearl banks:

1. It is therefore hereby enacted by the Governor of Ceylon, with the advice and consent of the Legislative Council thereof, that from

¹ See *ante*, p. 524.

² *British and Foreign State Papers*, vol. 31, p. 1231; 6 and 7 Victoria, c. 80.

³ *Fur Seal Arbitration, Proceedings of the Tribunal of Arbitration at Paris, 1893*, vol. 2, D. 464

and after the passing of this ordinance the possession on land of any drifting net or other net not being such as are used by men walking in the sea, or of any dredge or similar instrument, at any place within *twelve miles* of Tallaville or Talmanar, or at any place within *twelve miles* of any part of the shore at low-water mark between Tallaville and Talmanar, shall be unlawful, and every such net, dredge, or instrument that shall at any time be found within such limits shall be forfeited, and every person who shall at any time have had any such net, dredge, or instrument in his possession, or shall have moved or concealed or assisted in or procured the movement or concealment of any such net, dredge, or instrument within such limits, shall be guilty of an offence, and be liable on conviction thereof to a fine not exceeding ten pounds, or to imprisonment with or without hard labor for any period not exceeding six months.

Passed in Council the thirtieth day of November, one thousand eight hundred and forty-three.

KENNETH MACKENZIE,
Acting Clerk to the Council.

Published by order of His Excellency the Governor.

P. ANSTRUTHER,
Colonial Secretary.

1853, May 3.—*Act of the Government of New Brunswick, relating to the coast fisheries, and for the prevention of illicit trade.*¹

III. If the vessel or boat shall be foreign, and not navigated according to the laws of Great Britain and Ireland, and shall be found fishing, or to have been fishing, or preparing to fish, within *three marine miles* of such coasts or harbors, such vessel or boat and the cargo, shall be forfeited.

1853, August 20.—*Act of the British Parliament to amend and consolidate the laws relating to the customs of the United Kingdom and of the Isle of Man, and certain laws relating to trade and navigation and the British possessions, so far as it relates specifically to foreign countries, to foreign subjects, and to foreign goods, to trade with foreign countries, with British possessions abroad, and with India and places within the East India Company's charter, to British ships of war, to slave trade and other seizures, the coasting trade, and to copyright and reciprocity treaties with foreign Powers.*²

CCXII. If any ship or boat, belonging wholly or in part to Her Majesty's subjects, or having half the persons on board subjects of Her Majesty, shall be found or discovered to have been within *four*

¹ Hertalet, *Commercial Treaties*, vol. 13, p. 1088; 16 Victoria, cap. 69.

² *Ibid.*, vol. 9, p. 451; 16 and 17 Victoria, cap. 107.

leagues of that part of the coast of the United Kingdom which is between the North Foreland, on the coast of Kent, and Beachy Head, on the coast of Sussex, or within *eight leagues* of any other part of the coast of the United Kingdom, or if any foreign ship or boat, having one or more subjects of Her Majesty on board, shall be found or discovered to have been within *three leagues* of the coast of the United Kingdom, or if any foreign ship or boat shall be found or discovered to have been within *one league* of the coasts of the United Kingdom, or if any ship or boat shall be found or discovered to have been within *one league* of the Channel Islands, any such ship or boat so found or discovered, having on board or in any manner attached thereto, or having had on board or in any manner attached thereto, or conveying or having conveyed in any manner, any spirits, . . . tea, tobacco, snuff, tobacco stalks, tobacco stalk flour, snuff work . . . the said spirits . . . and also the ship or boat, shall be forfeited.

CCXVII. When any ship or boat belonging wholly or in part to Her Majesty's subjects, or having one-half of the persons on board being subjects of Her Majesty, shall be found within *100 leagues* of the coast of the United Kingdom, and shall not bring to upon signal made by any vessel or boat in Her Majesty's service or in the service of the revenue, hoisting the proper pendant and ensign in order to bring such ship or boat to, and thereupon chase shall be given, if any person or persons on board such ship or boat so chased, shall during the chase, . . . throw overboard any part of her lading, . . . such ship or boat shall be forfeited; . . .

CCXVIII. If any ship or boat liable to seizure or examination under this or any act for the prevention of smuggling shall not bring to when required so to do, . . . it shall be lawful for the captain, master or other person having charge or command of such vessel or boat in Her Majesty's Navy, or employed as aforesaid (first causing a gun to be fired as a signal), to fire at or into such ship or boat, . . .

1853.—*Opinion of the umpire of the London Claims Commission sitting under the Convention with the United States of February 8, 1853.*¹

It cannot be asserted, as a general rule, that nations have an exclusive right of fishery over all adjacent waters to a distance of *three marine miles* beyond an imaginary line drawn from headland to headland.

1855, January 13.—*Award of the tribunal in the case of the "Washington," arbitration with the United States, in which the marginal sea is defined at three marine miles.*²

¹ Moore, *International Law Digest*, vol. 1, p. 719.

² See *post*, p. 650.

1857, January 14.—Convention with France relative to the rights of fishery on the coast of Newfoundland and the neighboring coasts, establishing the three-mile extent.¹

1859, August 2.—Treaty with France limiting fishery rights to a distance of three miles from the point of low tide, along the entire length of the respective coasts.²

1860, July 20, 21, 23, 30.—General Iron Screw Collier Company v. Schurmanns.³

Where a British ship damages a foreign ship by a collision within the distance of *three miles* from the shore of the United Kingdom, the provisions of the Merchant Shipping Act, limiting the liability of the owner to the value of ship, apply.

Vice Chancellor Sir W. Page Wood. . . . Then comes the question how far our Legislature could properly affect the rights of foreign ships within the limits of *three miles* from the coast of this country? There can be no possible doubt that the water below low-water mark is part of the high seas. But it is equally beyond question that for certain purposes every country may, by the common law of nations, legitimately exercise jurisdiction over that portion of the high seas which lies within the distance of *three miles* from its shores. Whether this limit was determined with reference to the supposed range of cannon, on the principle that the jurisdiction is measured by the power of enforcing it, is not material, for it is clear, at any rate, that it extends to the distance of *three miles*, and that many instances may be given of the exercise of such jurisdiction by various nations.

I was not much impressed by the arguments as to the difficulties which would arise if the limit of *three miles* were taken as the extent of the operation of the act, because difficulties of that kind must arise when once you admit the *three miles* as the limit of jurisdiction for any purpose. They are just as great with respect to the authority given within this distance by the rules of international law, as they are with respect to the jurisdiction asserted by the municipal law. I can not, therefore, hesitate, on this ground, to hold that the part of the statute which relates to the liability of British owners was intended to operate, even as against foreigners, throughout that portion of the sea which lies within *three miles* of the coast.

¹ See *ante*, p. 525.

² See Calvo, *ante*, p. 23. This treaty has never been ratified by France, and its provisions are in force in British waters only. *Ibid.*

³ *English Reports* (Full Reprint), vol. 70, p. 712; Johnson & Hemming, vol. 1, p. 180.

1864, May 10.—*Act of the Government of Nova Scotia, relative to the coast and deep-sea fisheries.*¹

1. Officers of the colonial revenue, sheriffs, magistrates, and any other person duly commissioned for that purpose, may go on board any vessel or boat within any harbor in the Province, or hovering within *three marine miles* of any of the coasts or harbors thereof, and stay on board so long as he may remain within such place or distance.

1865, June 3.—*Ordinance regarding regulations for the observance of neutrality during the hostilities between the United States and the Confederate States of America.*²

Whereas Her Majesty has expressed her full determination to observe the duties of neutrality during the existing hostilities between the United States and the States calling themselves the Confederate States of America, and has resolved to prevent, as far as possible, the use of Her Majesty's harbors, ports, and coasts, and the waters within Her Majesty's territorial jurisdiction in aid of the warlike purposes of either belligerent; . . . Be it therefore enacted by His Excellency the Governor of Hong Kong, by and with the advice of the Legislative Council thereof, as follows:

1. Whosoever shall, within this colony or the water thereof, knowingly furnish or supply, or shall knowingly contract or agree to furnish or supply, or shall knowingly aid or assist in furnishing or supplying, or shall knowingly cause or procure to be furnished or supplied to, or for the use of, any ship of war or privateer of the United States of North America, or of the States calling themselves the Confederate States of America, whilst such ship of war or privateer is within the waters of this colony, or within any distance from this colony *not exceeding five miles*, any arms, ammunition, gunpowder, or naval or military stores, or shall, within this colony or the waters thereof put on board, or shall contract or agree to put on board, or shall aid or assist in putting on board, or shall cause or procure to be put on board of any vessel, boat, sampan or other craft, any arms, ammunition, gunpowder or naval or military stores, with the intent and design that the same may be conveyed to any such ship of war or privateer as aforesaid, whilst such ship of war or privateer is in the waters of this colony aforesaid, or within the distance from this colony aforesaid, shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years.

¹ Hertslet, *Commercial Treaties*, vol. 13, p. 1068.

² *British and Foreign State Papers*, vol. 58, p. 654; 28 Victoria, No. 9 of 1865.

2. Whosoever shall, within this colony or the waters thereof, without the leave or licence of the Governor for that purpose first had and obtained, knowingly furnish or supply, or knowingly contract or agree to furnish or supply, or knowingly cause or procure to be furnished or supplied to, or for the use of any ship of war or privateer of the United States of North America, or of the States calling themselves the Confederate States of America, whilst such ship of war or privateer is within the waters of this colony or within any distance from this colony not exceeding *five miles*, coal or other article, or shall within this colony or the waters thereof without such leave or licence as aforesaid, put on board, or contract or agree to put on board, or aid and assist in putting on board, or cause or procure to be put on board of any vessel, boat, sampan or other craft, any coal or other article, with the intent and design that the same may be conveyed to any such ship of war or privateer as aforesaid, whilst such ship of war or privateer is in the waters of this colony or within the distance from this colony aforesaid, shall be guilty of misdemeanor and, being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years.

1866, June 20.—British notice to owners and masters of British fishing vessels in Belgian waters.¹

Complaint having been made to Her Majesty's Government by the Belgian Minister, that certain British fishing vessels have for some time past been found within *three miles* of the Belgian coast engaged in shrimp fishing, which is the exclusive right of Belgian subjects within that limit:

The commissioners of Her Majesty's customs hereby give notice to all owners and masters of British fishing vessels, that they will not be permitted to fish in any manner within the said limit of *three miles* from any part of the coast of Belgium, and that the Belgium Government has issued instructions to the maritime commissioners of the sea shore to prosecute offenders in this respect, and, if need be, to seize their vessels.

By order of the said commissioners,

GEO. DICKINS, *Secretary*.

1867, November 11.—Convention with France relative to fisheries in the seas between Great Britain and France, fixing three miles as the general limit.²

¹ Hertslet, *Commercial Treaties*, vol. 14, p. 167.

² See *ante*, p. 525.

1868, May 22.—*Act of the Government of Canada, respecting fishing by foreign vessels.*¹

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

I. The Governor may, from time to time, grant to any foreign ship, vessel, or boat, or to any ship, vessel, or boat not navigated according to the laws of the United Kingdom, or of Canada, at such rate, and for such period not exceeding one year, as he may deem expedient, a license to fish for or take, dry or cure any fish of any kind whatever, in British waters, within *three marine miles* of any of the coasts, bays, creeks, or harbours whatever, of Canada, not included within the limits specified and described in Article 1 of the convention between His late Majesty King George the Third and the United States of America, made and signed at London on the 20th day of October, 1818.²

II. Any commissioned officer in Her Majesty's navy serving on board of any vessel of Her Majesty's navy cruising and being in the waters of Canada for purposes of affording protection to Her Majesty's subjects engaged in the fisheries, or any commissioned officer of Her Majesty's navy, fishery officer, or stipendiary magistrate on board of any vessel belonging to or in the service of the Government of Canada and employed in the service of protecting the fisheries, or any officer of the customs of Canada, sheriff, magistrate, or other person duly commissioned for that purpose, may go on board of any ship, vessel, or boat within any harbor in Canada or hovering (in British waters) within *three marine miles* of any of the coasts, bays, creeks or harbors in Canada, and stay on board so long as she may remain within such place or distance.

1868, July 13.—*Statute relating to the oyster fisheries of Ireland.*³

67. The Irish fishery commissioners may from time to time lay before Her Majesty in Council by-laws for the purpose of restricting or regulating the dredging for oysters on any oyster beds or banks situate within the distance of *twenty miles* measured from a straight line drawn from the eastern point of Lambay Island to Carnsore Point on the coast of Ireland, outside of the exclusive fishery limits of the British Islands, and all such by-laws shall apply equally to all boats and persons on whom they may be binding.

¹ Hertslet, *Commercial Treaties*, vol. 18, p. 1107; 31 Victoria, cap. 61.

² See *post*, p. 646.

³ Fur Seal Arbitration, *Proceedings of the Tribunal of Arbitration at Paris, 1893*, vol. 2, p. 457; 31 and 32 Victoria, cap. 45.

1868, July 31.—Act of the British Parliament, for conferring admiralty jurisdiction on the county courts; so far as relates to maritime jurisdiction, salvage, collisions at sea, and the slave trade.¹

II. If at any time after the passing of this act it appears to Her Majesty in Council, on the representation of the Lord Chancellor, expedient that any county court should have admiralty jurisdiction, it shall be lawful for Her Majesty, by order in Council, to appoint that court to have admiralty jurisdiction accordingly, and to assign to that court as its district for admiralty purposes any part or parts of any one or more district or districts of county courts; and the district so constituted for that court, with the parts of the sea (if any) adjacent to that district to a distance of *three miles* from the shore thereof, shall be deemed its district for admiralty purposes; and accordingly the judge and all officers of the court shall have jurisdiction and authority for those purposes throughout that district, as if the same was the district of the court for all purposes; . . .

1868, November.—British notice to fishermen fishing off the coasts of North Germany.²

Her Majesty's Government and the North German Government having come to an agreement respecting the regulations to be observed by British fishermen fishing off the coasts of the North German Confederation, the following notice is issued for the guidance and warning of British fishermen.

NOTICE.

I. The exclusive fishery limits of the German Empire are designated by the Imperial Government, as follows: That tract of the sea which extends to a distance of *three sea miles* from the extremest limit which the ebb leaves dry of the German North Sea coast of the German islands or flats lying before it, as well as those bays and incurvations of the coast which are *ten sea miles* or less in breadth, reckoned from the extremest points of the land and the flats, must be considered as under the territorial sovereignty of the German Empire.

1870, May 12.—Act of the Government of Canada, to amend the Act respecting fishing by foreign vessels.³

Whereas it is expedient, for the more effectual protection of the inshore fisheries of Canada against intrusion by foreigners, to amend

¹ Hertslet, *Commercial Treaties*, vol. 13, p. 1115; 31 and 32 Victoria, cap. 71.

² Hertslet, *ibid.*, vol. 14, p. 1055.

³ Hertslet, *ibid.*, vol. 13, p. 1165; 33 Victoria, cap. 15.

the act entitled "An Act respecting fishing by foreign vessels," passed in the 31st year of Her Majesty's reign; therefore, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

I. The 3rd section of the above cited act shall be, and is hereby repealed, and the following section is enacted in its stead:

III. Any one of such officers or persons as are above mentioned, may bring any ship, vessel, or boat, being within any harbor in Canada, or hovering (in British waters) within *three marine miles* of any of the coasts, bays, creeks or harbors in Canada, into port, and search her cargo, and may also examine the master upon oath touching the cargo and voyage; and if the master, or person in command, shall not truly answer the questions put to him in such examination, he shall forfeit 400 dollars; and if such ship, vessel, or boat, be foreign, or not navigated according to the laws of the United Kingdom, or of Canada, and have been found fishing, or preparing to fish, or to have been fishing (in British waters) within *three marine miles* of any of the coasts, bays, creeks, or harbors of Canada, not included within the above-mentioned limits, without a licence, or after the expiration of the period named in the last licence granted to such ship, vessel, or boat, under the first section of this act, such ship, vessel, or boat, and the tackle, rigging, apparel, furniture, stores, and cargo thereof shall be forfeited.

1870, June 16.—*Telegram from Lord Granville, British Foreign Secretary to the Governor General.*¹

Her Majesty's Government hopes that the United States fishermen will not be for the present prevented from fishing, except within *three miles* of land, or in bays which are less than six miles broad at the mouth.

1870, October 10.—*Memorandum of the Foreign Office respecting a commission to settle the limits of the right of exclusive fishery on the coast of British North America.*²

The right of Great Britain to exclude American fishermen from waters within *three miles* of the coasts is unambiguous, and it is believed, uncontested. But there appears to be some doubt what are the waters described as within *three miles* of bays, creeks, and harbors. When a bay is less than *six miles* broad, its waters are within the *three mile limit*, and therefore clearly within the meaning of the

¹ *Documents and Proceedings of the Halifax Commission, 1877*, vol. 1, p. 155.

² *North Atlantic Coast Fisheries Arbitration* (U. S. Sen. Doc. No. 870, 61st Cong., 3d sess.), vol. 2, p. 629.

treaty; but when it is more than that breadth, the question arises whether it is a bay of Her Britannic Majesty's dominions.

This is a question which has to be considered in each particular case with regard to international law and usage. When such a bay, etc., is not a bay of Her Majesty's dominions, the American fishermen will be entitled to fish in it, except within *three miles* of the coast; when it is a bay of Her Majesty's dominions they will not be entitled to fish within *three miles* of it, that is to say (it is presumed), within *three miles* of a line drawn from headland to headland.

1874, September 25.—Lord Derby, Secretary of State for Foreign Affairs to the British Chargé at Washington. Claim of the Spanish Government to a maritime jurisdiction of six nautical miles.¹

SIR: For many years past questions have, from time to time, arisen between the Governments of Great Britain and Spain with regard to the limit of the maritime jurisdiction of the last-named Power.

The Spanish Government claim the right to exercise such jurisdiction at a distance of *two leagues, or six nautical miles*, from the Spanish coast, and they found this claim upon a Royal "Cedula" issued on the 17th December, 1760, confirmed by a Royal Decision of the 1st May, 1775, and by Article 15 of the Royal Decree of the 3rd May, 1830; the present Spanish Minister for Foreign Affairs asserting, in a note addressed to Her Majesty's Chargé d'Affaires at Madrid, on the 4th ultimo, that no protest or reclamation whatever has been presented against those orders, all maritime Powers having acquiesced therein.

As regards the Government of Great Britain, this assertion of Señor Ulloa is entirely contrary to fact, and Her Majesty's Government can only suppose that it was made through inadvertence. The British Government have always uniformly and strenuously resisted the pretensions of the Spanish Government to exercise jurisdiction at a greater distance than *one league, or three nautical miles*, from the Spanish coast seawards, or within bays of the Spanish shore.

This distance the British Government have always held to be the proper limit of maritime jurisdiction, and Her Majesty's present Government, after consulting the law officers of the Crown, entirely concur in that view, which they are advised is supported by the authority of all writers upon international law, and by the decisions of the tribunals of various countries.

It appears to Her Majesty's Government to be manifest that some limit to maritime jurisdiction must be fixed by general consent among the different nations, and that no nation can have the right to assume, by a decree of its own Government, a jurisdiction more extended

¹ *British and Foreign State Papers*, vol. 70, p. 186.

than that sanctioned by such general assent; otherwise some nations might claim an unlimited jurisdiction, and assume the right to stop and search vessels sailing under a foreign flag on any part of the high seas.

In accordance with these views, Her Majesty's Government have recently intimated to the Spanish Government that their pretensions will not be submitted to by Great Britain, and that any attempt to carry out those pretensions will lead to very serious consequences.

Her Majesty's Government are, however, most anxious to avoid any risk of a collision with Spain, and it has occurred to them that if the views which they have expressed to the Spanish Government were supported by the concurrence of other maritime Powers, the Spanish Government might be the more readily convinced of the untenability of the pretensions they have hitherto put forward, and might see the necessity of withdrawing them. I have, therefore, to instruct you to communicate a copy of this despatch to the United States' Minister for Foreign Affairs, and to state to him that Her Majesty's Government would be glad to be made acquainted with the views of the United States' Government as to the extent of maritime jurisdiction that, in their opinion, can properly be claimed by any Power; and, further, to be informed whether the United States' Government have ever recognized the claim of Spain to a *six mile limit*, or have ever protested against such claim.

1874, December.—*British notice to fishermen fishing off the coasts of the German Empire.*¹

Her Majesty's Government and the German Government having come to further agreement respecting the regulations to be observed by British fishermen fishing off the coasts of the German Empire, the following notice is issued for the guidance and warning of British fishermen.

NOTICE

I. The exclusive fishery limits of the German Empire are designated by the Imperial Government, as follows: that tract of the sea which extends to a distance of *three sea miles* from the extremest limit which the ebb leaves dry of the German North Sea coast of the German islands or flats lying before it, as well as those bays and incurvations of the coast which are *ten sea miles* or less in breadth, reckoned from the extremest points of the land and the flats, must be considered as under the territorial sovereignty of the German Empire.

¹ Hertslet, *Commercial Treaties*, vol. 14, p. 1057.

1876, November 11, 13.—*Regina v. Keyn*.¹

Sir R. PHILLIMORE. The prisoner was indicted at the Central Criminal Court for the manslaughter of Jessie Dorcas Young on the high seas, and within the jurisdiction of the Admiralty of England.

The deceased was a passenger on board the *Strathclyde*, a British steam vessel bound from London to Bombay.

This vessel, when at a distance of one mile and nine-tenths of a mile S. SE. from Dover pier-head, and within two and a half miles from Dover beach, was run into by the *Franconia*, a German steamer, in consequence of which she sank, and the deceased woman was drowned.

The *Franconia* was carrying the German mails from Hamburg to St. Thomas in the West Indies.

The prisoner, being the officer in command of the *Franconia*, was convicted of manslaughter, but a question of law was reserved for this Court of Criminal Appeal. An objection was taken on the part of the prisoner that, inasmuch as he was a foreigner, in a foreign vessel, on a foreign voyage, sailing upon the high seas, he was not subject to the jurisdiction of any court in this country. The contrary position maintained on the part of the Crown is that, inasmuch as at the time of the collision both vessels were within the distance of *three miles* from the English shore, the offense was committed within the realm of England, and is triable by the English court.

The jurisdiction which now exists over offenses committed at sea is that which was once possessed by the court of the admiral.

The county extends to low-water mark, where the "high seas" begin; between high- and low-water mark, the courts of oyer and terminer had jurisdiction when the tide was out, the court of the admiral when the tide was in.

There appears to be no sufficient authority for saying that the high sea was ever considered to be within the realm, and, notwithstanding what is said by Hale in his treatises *De Jure Maris* and *Pleas of the Crown*, there is a total absence of precedents since the reign of Edward III, if indeed any existed then, to support the doctrine that the realm of England extends beyond the limits of counties.

I am not aware of any instance, none was cited to us, of the exercise of criminal jurisdiction over a foreign vessel for an offense committed when she was not within a port or harbor of the inland waters of the realm.

Various statutes have been passed from time to time empowering what may be called inland authorities, such as justices of the peace, coroner, and the Lord Warden of the Cinque Ports, to try offenses

¹ *Law Reports, Exchequer Division*, vol. 2, pp. 65–86.

committed at sea. Some clauses in the Merchant Shipping Act it may be necessary to refer to hereafter; but it may be stated here that no statute will be found to authorize the exercise of the criminal jurisdiction over a foreign vessel not in one of our ports or inland waters.

It being, then, in my opinion, clear that the jurisdiction to try this prisoner was not derived from the common law, or the statute law, or the law of the high court of admiralty, what law did render the English court competent for this purpose?

As I understand the contention on behalf of the Crown, the answer is, international law; in other words, by the consent of all civilized states, England has become entitled to include within her realm a *marine league* of sea, and therefore has jurisdiction over a foreign vessel within that limit.

It is, indeed, a most grave question whether, if this statement of international law were correct, nevertheless an act of Parliament would not be required to empower the court to exercise jurisdiction; but, waiving this consideration for the present, it becomes important in this view of the question to consider the sources from which we are to derive this doctrine of international law.

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In the memorable answer, pronounced by Montesquieu to be *réponse sans réplique*, and framed by Lord Mansfield and Sir George Lee, of the British to the Prussian Government.

The law of nations is said to be founded upon justice, equity, convenience, and the reason of the thing, and confirmed by long usage.

It is more especially to this usage, as evidencing the consent of nations, that great judges, such, among others, as Lord Stowell and Chancellor Kent, and great jurists of all countries, have continually referred.

[He here quotes several eminent authorities on this point.]

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With these preliminary observations, I proceed to inquire what is the nature and extent of the jurisdiction over the high seas, which international law confers upon or concedes to the sovereign of the adjacent territory.

Whatever may have been the claims asserted by nations in times past—perhaps no nation has been more extravagant than England in this matter—it is at the present time an unquestionable proposition of international jurisprudence, that the high seas are of right navigable by the ships of all States. Whether the reasons upon which this liberty of navigation rests be, as some jurists say, that the open

sea is incapable of continuous occupation and insusceptible of permanent appropriation, or, as other jurists say, that the use of it is inexhaustible, and therefore, common to all mankind; or, whether it rests upon both these, or upon other reasons also, it is unnecessary to inquire. This liberty of navigation is a fact recognized by all civilized States.

An important corollary of this proposition is that the merchant vessel (with ships of war we are not now concerned) on the open sea is subject only to the law of her flag, that is, the law of the State to which she belongs.

The next proposition, though it be of an elementary kind, to which attention should be drawn, is, that every State is entitled to exclusive dominion over its own territory, that is, not only over the soil and over all subjects, but over all foreigners commorant therein.

When (says Marshall, C. J.) private individuals of one nation spread themselves through another as business or caprice may direct, mingling indiscriminately with the inhabitants of that other, or when merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such individuals or merchants did not owe temporary and local allegiance, and were not amenable, to the jurisdiction of the country.¹

The question as to dominion over portions of the seas inclosed within headlands or contiguous shores, such as the King's Chambers, is not now under consideration. It is enough to say that within this term "territory" are certainly comprised the ports and harbors, and the space between the flux and reflux of tide, or the land up to the farthest point at which the tide recedes. But it is at this point that the difficulty presented by the case before us begins, and here the following questions present themselves for solution:

1. Is a state entitled to any extension of dominion beyond low water mark?

2. If so, how far does this territory, or do these territorial waters, as they are usually called, extend?

3. Has a state the same dominion over these territorial waters as over the territory of her soil and in her ports, or is it of a more limited character and confined to certain purposes?

With respect to the first of these questions the answer may be given without doubt or hesitation, namely, that a state is entitled to a certain extension of territory, in a certain sense of that word, beyond low water mark.

¹ Schooner "Exchange" v. McFadden and Others.

With respect to the second question, the distance to which the territorial waters extend, it appears on an examination of the authorities that the distance has varied (setting aside even more extravagant claims) from *one hundred to three miles*, the present limit.

[Here he quotes Grotius, Bynkershoek, and Vattel.]

When Azuni wrote in 1796 his *System dei Principii del Diritto Maritimo* he complained that the limit was still undecided (*sempre combattuto e non ancora deciso*), and hoped the *three miles* distance would be agreed upon, as "without doubt" it was the greatest distance cannon shot should ever be made to reach.¹

Since this period, the *three-mile* belt of water has been adopted in treaties and conventions, though a longer distance is still claimed for purposes of protecting the revenue against smuggling.

[He here quotes Kent, Wheaton, and Massé as supporting the *three-mile* limit.]

The third question, though touched upon in the preceding citations, remains to be substantively considered; it is one of much importance, viz., whether, admitting that the state has a dominion over three miles of adjacent water, it is the same dominion which the possessor has over her lands and her ports, or is it of a more limited character—limited to the purpose of protecting the adjacent shore, for which it was granted, and not extending to a general sovereignty over all passing vessels, and therefore not improbably called *ligne de respect*? [Cites authority.]

The sound conclusions which result from the investigation of the authorities which have been referred to appear to me to be these:

The consensus of civilized independent States has recognized a maritime extension of frontier to the distance of *three miles* from low-water mark, because such a frontier or belt of water is necessary for the defence and security of the adjacent State.

It is for the attainment of these particular objects that a dominion has been granted over this portion of the high seas.

This proposition is materially different from the proposition contended for, namely, that it is competent to a State to exercise within these waters the same rights of jurisdiction and property which appertain to it in respect to its lands and its ports. There is one obvious test by which the two sovereignties may be distinguished.

According to modern international law, it is certainly a right incident to each State to refuse a passage to foreigners over its territory by land, whether in time of peace or war. But it does not appear to have the same right with respect to preventing the passage of foreign ships over this portion of the high seas.

In the former case there is no *jus transitus*; in the latter case there is.

¹ Vol. 1, pp. 67-68.

The reason of the thing, that is, the defense and security of the State, does not require or warrant the exclusion of peaceable foreign vessels from passing over these waters, and the custom and usage of nations has not sanctioned it.

Consequences fraught with mischief and injustice might flow from the opposite doctrine, which would render applicable to a foreign vessel while *in itinere* from one foreign port to another, passing over these waters, all the criminal law of the adjacent territory. No single instance has been brought to our notice of the practical exercise by any nation of this jurisdiction.

The authorities cited in order to show that a foreign vessel is subject to the laws of the foreign port which she enters appear to me inapplicable to the present case.

A foreign merchant vessel going into the port of a foreign State subjects herself to the ordinary law of the place during the period of her commorancy there; she is as much a *subditus temporaneus* as the individual who visits the interior of the country for the purposes of pleasure or business.

Upon the subject of the *three-mile* belt of territorial water Parliament has frequently legislated. It might, perhaps, be not impertinently asked, why, if these waters are territorial in the same sense as the land, and those who traverse them are already subject to the law. But, passing by this observation, it will be found on examination of the statutes that the provisions in them are either framed exclusively for British subjects and ships, or that they relate to the protection and peace of the State.

Upon the whole, I am of opinion that the court had no jurisdiction over this foreigner for an offense committed on board a foreign ship on the high seas though within *three miles* of the coast, that he is governed by the law of the State to which his flag belongs, and that the conviction cannot be sustained.

1876, July 24.—*An Act to consolidate the customs laws.*¹

If any ship or boat shall be found or discovered to have been within any port, bay, harbor, river, or creek of the United Kingdom or the Channel Islands, or within *three leagues* of the coast thereof if belonging wholly or in part to British subjects, or having half the persons on board subjects of Her Majesty, or within *one league* if not British, having false bulkheads, false bows, double sides or bottom,

¹ 39 and 40 Victoria, cap. 36, sec. 179.

or any secret or disguised place adapted for concealing goods, or any hole, tube, pipe, or device adapted for running goods, or having on board or in any manner attached thereto, or having had on board or in any manner attached thereto, or conveying or having conveyed in any manner any spirits, tobacco, or snuff, in packages of any size and character in which they are prohibited to be imported into the United Kingdom or the Channel Islands, or any spirits or tobacco or snuff imported contrary to the customs acts, or any tobacco stalks, tobacco stalk flour, or snuff work, or which shall be found or discovered to have been within *three leagues* of any part of the coast of the United Kingdom from which any part of the lading of such ship or boat shall be or have been thrown overboard, or on board which any goods shall be or have been staved or destroyed to prevent seizure, every such ship or boat, together with any such spirits, tobacco, or snuff, tobacco stalks, tobacco stalk flour, or snuff work, and all packages, casks, or other vessels containing the same, and everything packed therein, and also any cordage or other articles adapted and prepared for slinging or sinking small casks, or any casks or other vessels whatsoever of less size or content than twenty gallons of the description used for the smuggling of spirits found on board, shall be forfeited; . . .

*1877, January 18, 19, 20; February 14.—Direct United States Cable Company v. Anglo-American Telegraph Company.*¹

LORD BLACKBURN:

The question raised in this case, and to which their Lordships confine their judgment, is as to the territorial dominion over a bay of configuration and dimensions such as those of Conception Bay above described.

The few English common-law authorities on this point relate to the question as to where the boundary of counties ends, and the exclusive jurisdiction at common law of the court of admiralty begins, which is not precisely the same question as that under consideration; but this much is obvious, that when it is decided that any bay or estuary of any particular dimensions is or may be a part of an English county, and so completely within the realm of England, it is decided that a similar bay or estuary is or may be part of the territorial dominions of the country possessing the adjacent shore.

But in *Reg. v. Cunningham* it did become necessary to determine whether a particular spot in the Bristol Channel, on which three

¹ *Law Reports, Appeal Cases*, vol. 2, pp. 416, 417, 419.

foreigners on board a foreign ship had committed a crime, was within the county of Glamorgan, the indictment having, whether necessarily or not, charged the offense as having been committed in that county.

This much was determined, that a place in the sea, out of any river, and where the sea was more than ten miles wide, was within the county of Glamorgan, and consequently, in every sense of the words within the territory of Great Britain. It also shows that usage and the manner in which that portion of the sea had been treated as being part of the county was material, and this was clearly Lord Hale's opinion, as he says not that a bay is part of the county, but only that it may be.

Passing from the common law of England to the general law of nations, as indicated by the text writers on international jurisprudence, we find an universal agreement that harbors, estuaries, and bays landlocked belong to the territory of the nation which possesses the shores round them, but no agreement as to what is the rule to determine what is "bay" for this purpose.

It seems generally agreed that where the configuration and dimensions of the bay are such as to show that the nation occupying the adjoining coasts also occupies the bay it is part of the territory; and with this idea most of the writers on the subject refer to defensibility from the shore as the test of occupation; some suggesting therefore a width of *one cannon shot* from shore to shore, or *three miles*; some a *cannon shot* from each shore, or *six miles*; some an arbitrary distance of *ten miles*. All of these are rules which, if adopted, would exclude Conception Bay from the territory of Newfoundland, but also would have excluded from the territory of Great Britain that part of the Bristol Channel which in *Reg. v. Cunningham* was decided to be in the county of Glamorgan. On the other hand, the diplomatists of the United States in 1793 claimed a territorial jurisdiction over much more extensive bays, and Chancellor Kent, in his *Commentaries*, though by no means giving the weight of his authority to this claim, gives some reasons for not considering it altogether unreasonable.

It does not appear to their Lordships that jurists and text writers are agreed what are the rules as to dimensions and configuration, which, apart from other considerations, would lead to the conclusion that a bay is or is not a part of the territory of the State possessing the adjoining coasts; and it has never, that they can find, been made the ground of any judicial determination. . . . In point of fact, the British Government has for a long period exercised dominion over this bay, and that their claim has been acquiesced in by other

nations, so as to show that the bay has been for a long time occupied exclusively by Great Britain, a circumstance which in the tribunals of any country would be very important. And moreover (which in a British tribunal is conclusive) the British Legislature has by acts of Parliament declared it to be part of the British territory, and part of the country made subject to the legislature of Newfoundland.

To establish this proposition it is not necessary to go further back than to the 59 George 3, c. 38, passed in 1819, now nearly sixty years ago.

There was a convention made in 1818 between the United States and Great Britain relating to the fisheries of Labrador, Newfoundland, and His Majesty's other possessions in North America, by which it was agreed that the fishermen of the United States should have the right to fish on part of the coasts . . . and should not enter any "bays" in any part of the coast except for the purposes of shelter and repairing damages, and purchasing wood, and obtaining water, and no other purposes whatever. It seems impossible to doubt that this convention applied to all bays, whether large or small, on that coast, and consequently to Conception Bay . . . the act already referred to, 59 George 3, c. 38, though passed chiefly for the purpose of giving effect to the convention of 1818, goes further.

It enacts not merely that subjects of the United States shall observe the restrictions agreed on by the convention, but that all persons, not being natural-born subjects of the King of Great Britain shall observe them under penalties. And in particular, by sect. 4, it enacts that if "any person" upon being required by the governor, or any officer acting under such governor, in the execution of any order or instructions from His Majesty in Council, shall *inter alia* refuse to depart from such bays, he shall be subject to a penalty of £200.

No stronger assertion of exclusive dominion over these bays could well be framed. As has been already observed, Conception Bay is in every sense of the words a bay within Newfoundland, though of considerable width; and as there is nothing to justify a construction of the act limiting it to bays not exceeding any particular width, this is an unequivocal assertion of the British Legislature of exclusive dominion over this bay as part of the British territory. And as this assertion of dominion has not been questioned by any nation from 1819 down to 1872, when a fresh convention was made, this would be very strong in the tribunals of any nation to show that this bay is by prescription part of the exclusive territory of Great Britain. As already observed, in a British tribunal it is decisive.

1877, August 13.—*British order in council, for the Regulation of British Jurisdiction in the Western Pacific Islands (Friendly Islands, Navigators' Islands, Union Islands, Phoenix Islands, Ellice Islands, Gilbert Islands, Marshall Islands or Archipelago, Caroline Islands, Solomon Islands, Santa Cruz Islands, Rotumah Island, part of Island of New Guinea, Islands or Archipelago of New Britain and New Ireland, Louisiade Archipelago, etc.) and the water within three miles of every island or place above mentioned.*¹

PART II.—EXTENT AND APPLICATION OF ORDER.

5. The islands and places in the Western Pacific Ocean to which this order extends and applies, and which are in this order collectively referred to as the Western Pacific Islands, are the following, namely:

- (1) The groups of islands known as—
 The Friendly Islands.
 The Navigators' Islands.
 The Union Islands.
 The Phoenix Islands.
 The Ellice Islands.
 The Gilbert Islands.
 The Marshall Islands or Archipelago.
 The Caroline Islands.
 The Solomon Islands.
 The Santa Cruz Islands.
- (2) The Island of Rotumah.
- (3) The part of the island of New Guinea eastward of the 143rd meridian of longitude.
- (4) The islands or archipelago of New Britain and New Ireland.
- (5) The Louisiade Archipelago.
- (6) All other islands in the Western Pacific Ocean not being within the limits of the colonies of Fiji, Queensland, or New South Wales, and not being within the jurisdiction of any civilized Power.
- (7) The waters within *three miles* of every island or place aforesaid.

6. This order applies to—

- (1) All British subjects for the time being within the Western Pacific Islands, whether resident or not.
- (2) All British vessels for the time being within the waters mentioned in Article 5 of this order.
- (3) Foreigners, in the cases, and according to the conditions in this order specified, but not otherwise.

¹ Hertslet, *Commercial Treaties*, vol.14, p. 874.

1877, October 23.—*Schedule annexed to the British Order in Council, relative to the "Sea Fisheries Act, 1868."*—Additional regulations.¹

1. All open or undecked boats employed in fishing or dredging for purposes of sale on the coasts of England, Wales, Scotland, and the islands of Guernsey, Jersey, Alderney, Sark, and Man, and not going outside:

(a) The distance of *three miles* from low-water mark along the whole extent of the said coasts;

(b) In cases of bays less than *ten miles* wide the line joining the headlands of such bays;

shall not be subject to the regulations for the lettering, numbering, and registering of British sea-fishing boats under Part II of "The Sea Fisheries Act, 1868," made by Her Majesty on the 18th day of June, 1869.

2. The owner and master of any boat required to be registered, lettered, and numbered, or otherwise marked in pursuance of the said regulations, who shall, in the absence of a reasonable cause for the same (proof whereof shall lie on him), efface, cover, or conceal, or cause to be effaced, covered, or concealed in any manner whatsoever the letters, numbers, and names placed on such boats or their sails, shall each be liable to a penalty not exceeding 20*l*.

1878, August 16.—*Act of the British Parliament, for extending and amending the foreign jurisdiction Acts: [Jurisdiction over British subjects resident in countries without regular government, and in vessels in Chinese and Japanese waters.]*²

6. It shall be lawful for Her Majesty the Queen in Council, from time to time, by order, to make for the government of Her Majesty's subjects being in any vessel at a distance of not more than *one hundred miles* from the coast of China or of Japan, any law that to Her Majesty in Council may seem meet, as fully and effectually as any such law might be made by Her Majesty in Council for the government of Her Majesty's subjects being in China or in Japan.

1878, August 16.—*Act of the British Parliament to regulate the law relating to the trial of offenses committed on the sea within a certain distance of the coasts of Her Majesty's dominions.*³

2. An offense committed by a person, whether he is or is not a subject of Her Majesty, on the open sea within the territorial waters

¹ Hertslet, *Commercial Treaties*, vol. 14, p. 1054.

² *Ibid.*, p. 1220; 41 and 42 Victoria, cap. 67.

³ *Ibid.*, p. 1222; Moore, *International Law Digest*, vol. 1, p. 714; 41 and 42 Victoria, cap. 73.

of Her Majesty's dominions, is an offense within the jurisdiction of the admiral, although it may have been committed on board or by means of a foreign ship, and the person who committed such offense may be arrested, tried, and punished accordingly.

7. . . .

"The territorial waters of Her Majesty's dominions," in reference to the sea, means such part of the sea adjacent to the coast of the United Kingdom, or the coast of some other part of Her Majesty's dominions, as is deemed by international law to be within the territorial sovereignty of Her Majesty; and for the purpose of any offense declared by this Act to be within the jurisdiction of the admiral, any part of the open sea within *one marine league* of the coast measured from low-water mark shall be deemed to be open sea within the territorial waters of Her Majesty's dominions.

1880, July.—*Notice to British fishermen for the observance of the regulations agreed upon between the British and German Governments for fishing off the coasts of the German Empire.*¹

Her Majesty's Government and the German Government having agreed respecting the regulations to be observed by British fishermen fishing off the coasts of the German Empire, the following notice is issued for the guidance and warning of British fishermen:

NOTICE.

1. The exclusive fishery limits of the German Empire are designated by the Imperial Government as follows: that tract of the sea which extends to a distance of *three sea miles* from the extremest limit which the ebb leaves dry of the German North Sea coast, of the German islands or flats lying before it, as well as those bays and incurvations of the coast which are *ten sea miles* or less in breadth, reckoned from the extremest points of the land and the flats, must be considered as under the territorial sovereignty of the German Empire.

2. The exclusive right of fishery within the above limits is accordingly to be enjoyed by fishermen of German nationality only, . . .

1881.—*The Fisheries Act of New South Wales.*²

The eastern limit of the coastal fisheries is, in conformity with established law regulating the coastal boundaries of maritime States, regarded as being confined to a range of *one nautical league* from the margin of the coast along its entire length from Point Danger on the north to Cape Howe on the south.

¹ Hertslet, *Commercial Treaties*, vol. 15, p. 209.

² Lindsay G. Thompson, *History of the Fisheries of New South Wales*, p. 85.

1881, May 18.—*British Order in Council, for regulating the conduct of the inhabitants of Cyprus and others during hostilities between States with which Her Majesty is at peace, and for the control by the high commissioner over recruiting in Cyprus for the service of any State.*¹

“The ports or waters of Cyprus” shall include all ports, harbors, roadsteads, anchorages, quarantine grounds, estuaries, creeks, bays, and waters within a limit of *three marine miles* round the island of Cyprus.

1881, November 1.—*Charter granted to the British North Borneo Company.*²

And whereas the said petition States (among other things) to the effect that on the 29th day of December, 1877, the Sultan of Brunei, in the island of Borneo, made and issued to the petitioner, Alfred Dent, and another, or one of them, three several grants of territories, lands, and islands therein mentioned, and a commission:

And whereas the said petition further states that by the first of the grants aforesaid the Sultan of Brunei granted to the grantees conjointly, their heirs, associates, successors, or assigns, all the territory and land belonging to the Sultan on the west coast of Borneo comprising Gaya Bay from Gaya Head to Loutut Point, including Sapangar Bay, and Gaya Bay, and Sapangar Island, and Gaya Island, and all the other islands within the limits of the harbor and within *three marine leagues* of the coast, likewise the province and territory of Pappar adjoining the province of Benoni, and belonging to the Sultan as his private property; and in consideration of that grant the grantees promised to pay severally and conjointly to the Sultan, his heirs or successors, the sum of 4,000 dollars per annum; and by that grant the said territories were from the date thereof declared vested in the grantees, their heirs, associates, successors, or assigns, for so long as they shall choose and desire to hold them; provided, however, that the Sultan should have the right to resume the control and government of the said territories if the above-mentioned annual compensation should not have been paid for three successive years:

And whereas the said petition further state that by the second of the grants aforesaid the Sultan of Brunei granted to the grantees conjointly, their heirs, associates, successors, or assigns, all the territories belonging to the Sultan from the Sulaman River on the northwest coast of Borneo unto the river Paitan on the northeast coast of the island, containing twenty-one States, together with the Island of Banguay and all the other islands within *three marine*

¹ *British and Foreign State Papers*, vol. 73, p. 358.

² Hertslet, *Commercial Treaties*, vol. 15, p. 85.

leagues of the coast, for their own exclusive uses and purposes; and in consideration of that grant the grantees promise to pay severally and cojointly to the Sultan, his heirs or successors, the sum of 6,000 dollars per annum; and by that grant the said territories were from the date thereof declared vested in the grantees, their associates, successors, or assigns, for so long as they should choose to hold them; provided, however, that the Sultan should have the right to resume the control and government of the said territories if the above-mentioned annual compensation should not have been paid for three successive years:

And whereas the said petition further states that by the third of the grants aforesaid the Sultan of Brunei granted to the grantees, their heirs, associates, successors, or assigns, all the following territories belonging to the kingdom of Brunei, and comprising the States of Paitan, Sugut, Bangaya, Labuk, Sandakan, Kina Batangan, Mumiang, and all the territories as far as the Sibuco River, with all the islands within *three leagues* of the coast belonging thereto, for their own exclusive and absolute uses and purposes: and in consideration of that grant the grantees promised to pay cojointly and severally as compensation the sum of 2,000 dollars per annum; and from that date the said territories were thereby declared vested in the grantees, their heirs, associates, successors, and assigns, for so long as they should choose or desire to hold them; provided, however, that the Sultan should have the right to resume the control and government of the said territories if the above-mentioned annual compensation should not have been paid for three successive years:

And whereas the said petition further states that by the commission aforesaid, after reciting to the effect that the Sultan of Brunei had seen fit to grant to his trusty and well beloved friends, the grantees, certain portions of the dominions owned by him, comprising the entire northern portion of the island of Borneo from the Sulaman River on the west coast of Maludu Bay, and to the River Paitan, and thence the entire eastern coast as far as the Sibuco River, comprising the States of Paitan, Sugut, Bangaya, Labuk, Sandakan, Kina Batangan, and Mumiang, and other lands as far as Sibuco River, furthermore the provinces of Kimanis and Benoni, the province of Pappar, and the territory of Gaya Bay and Sapangar Bay, with all the lands and islands belonging thereto, and likewise the island of Banguay, for certain considerations between them agreed, and that one of the grantees therein in that behalf named was the chief and only authorized representative of his company in Borneo, it was declared that the Sultan had nominated and appointed, and thereby did nominate and appoint, the same grantee supreme ruler of the above-named territories, with the title of Maharajah of Sabah

(North Borneo) and Rajah of Gaya and Sandakan, with power of life and death over the inhabitants, with all the absolute rights of property vested in the Sultan over the soil of the country, and the right to dispose of the same, as well as the rights over the productions of the country, whether mineral, vegetable, or animal, with the rights of making laws, coining money, creating an army and navy, levying customs rates on home and foreign trade, and shipping and other dues, and taxes on the inhabitants, as to him might seem good or expedient, together with all other powers and rights usually exercised by and belonging to sovereign rulers, and which the Sultan thereby delegated to him of his own free will; and the Sultan called upon all foreign nations with whom he had formed friendly treaties and alliances to acknowledge the said Maharajah as the Sultan himself in the said territories, and to respect his authority therein; and in case of the death or retirement from office of the said Maharajah, then his duly appointed successor in the office of supreme ruler and governor-in-chief of the company's territories in Borneo should likewise succeed to the office and title of Maharajah of Sabah and Rajah of Gaya and Sandakan, and all the powers above enumerated be invested in him:

And whereas the said petition further states that on the same day the Pangeran Tumongong (Chief Minister) of Brunei made to the same two persons, their heirs, associates, successors, or assigns, a grant of the provinces of Kimanis and Benoni, on the northwest coast of Borneo, with all the islands belonging thereto within *three marine leagues* of the coast of the said territories belonging to him as his private property, to hold for their own exclusive and absolute uses and purposes; and in consideration of that grant the grantees promised to pay as compensation to the Pangeran Tumongong, his heirs or successors, the sum of 8,000 dollars per annum; and the said territories were thereby declared vested in the grantees, their heirs, associates, successors, or assigns, for so long as they should choose or desire to hold them; and they further promise to protect the Pangeran Tumongong with kindness:

And whereas the said petition further states that on the 22nd day of January, 1878, the Sultan of Sooloo and the dependencies thereof (in the said petition and in this our charter referred to as the Sultan of Sooloo) made and issued to the same two persons, or one of them, a grant of his rights and powers over territories, lands, states, and islands therein mentioned, and a commission:

And whereas the said petition further states that by the last-mentioned grant the Sultan of Sooloo, on behalf of himself, his heirs and successors, and with the consent and advice of the Datoos in Council assembled, granted and ceded of his own free and sovereign will to the grantees, as representatives of a British company co-

jointly, their heirs, associates, successors, or assigns, for ever and in perpetuity, all the rights and powers belonging to the Sultan, over all the territories and lands being tributary to him on the mainland of the island of Borneo, commencing from the Pandassan River on the northwest coast, and extending along the whole east coast as far as the Sibuco River in the south, and comprising, amongst others, the States of Paitan, Sugut, Bangaya, Labuk, Sandakan, Kina Batangan, Mumiang, and all the other territories and states to the southward thereof, bordering on Darvel Bay, and as far as the Sibuco River, with all the islands within *three marine leagues* of the coast; and in consideration of that grant the grantees promised to pay as compensation to the Sultan, his heirs or successors, the sum of 5,000 dollars per annum; and the said territories were thereby declared vested in the grantees conjointly, their heirs, associates, successors, or assigns, for as long as they should choose or desire to hold them; provided, however, that the rights and privileges conferred by that grant should never be transferred to any other nation or company of foreign nationality without the sanction of our government first being obtained; and in case any dispute should arise between the Sultan, his heirs or successors, and the grantee therein in that behalf specified or his company, the matter should be submitted to our consul general for Borneo; and that grantee, on behalf of himself and his company, further promised to assist the Sultan, his heirs, or successors, with his best counsel and advice whenever the Sultan might stand in need of the same: . . .

1883, August 2.—*The sea fisheries act.*¹

ARTICLE 7. (1) A foreign sea fishing boat shall not enter within the exclusive fishery limits² of the British Islands, except for purposes recognized by international law, or by any convention, treaty, or arrangement for the time being in force between Her Majesty and any foreign State, or for any lawful purpose.

1885, October.—*Case of the Allegamean, with the United States defining the marginal sea at cannon range or one marine league.*³

1886, November 26.—*Act of the Government of Canada, further to amend the act respecting fishing by foreign vessels.*⁴

Whereas it is expedient for the more effectual protection of the in-shore fisheries of Canada against intrusion by foreigners, to further

¹ *British and Foreign State Papers*, vol. 74, p. 200.

² *Three miles*. See Hague Act, May 6, 1882, *ante*, p. 485.

³ See *post*, p. 667.

⁴ *British and Foreign State Papers*, vol. 77, p. 799; 49 Victoria, c. 114.

amend the act intituled "An Act respecting fishing by foreign vessels," passed in the 31st year of Her Majesty's reign, and chaptered 61: Therefore Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

1. The section substituted by the 1st section of the Act 33 Victoria, cap. 15, intituled "An Act to amend the Act respecting fishing by foreign vessels," for the 3rd section of the hereinbefore-recited Act, is hereby repealed, and the following section substituted in lieu thereof:

3. Any one of the officers or persons hereinbefore mentioned may bring any ship, vessel, or boat, being within any harbor in Canada, or hovering in British waters within *three marine miles* of any of the coasts, bays, creeks or harbors in Canada, into port, and search her cargo, and may also examine the master upon oath touching the cargo and voyage; and if the master or person in command does not truly answer the questions put to him in such examination, he shall incur a penalty of 400 dollars; and if such ship, vessel, or boat is foreign, or not navigated according to the laws of the United Kingdom or of Canada, and (a) has been found fishing, or preparing to fish, or to have been fishing in British waters within *three marine miles* of any of the coasts, bays, creeks, or harbors of Canada, not included within the above-mentioned limits, without a licence, or after the expiration of the term named in the last licence granted to such ship, vessel, or boat, under the 1st section of this act; or (b) has entered such waters for any purpose not permitted by treaty or convention, or by any law of the United Kingdom or of Canada for the time being in force, such ship, vessel, or boat, and the tackle, rigging, apparel, furniture, stores, and cargo thereof, shall be forfeited.

1888.—*British instructions*.¹

2. These powers may be exercised in any waters except the territorial waters of a neutral State. The territorial waters of a State are those within *three miles* from low-water mark of any part of the territory of that State, or forming bays within such territory, at any rate, in the case of bays the entrance to which is not more than *six miles* wide.

1888, January 20.—*An Act to regulate the pearl-shell and bêche-de-mer fisheries in Australasian waters adjacent to the Colony of Queensland*.²

Whereas by certain acts of the Parliament of the Colony of Queensland provision has been made for regulating the pearl-shell and

¹ Thomas E. Holland, *British Manual of Naval Prize Law*, 1888, p. 1.

² Fur Seal Arbitration, *Proceedings of the Tribunal of Arbitration at Paris*, 1893, vol. 2, p. 467.

bêche-de-mer fisheries in the territorial waters of that colony: And whereas, by reason of the geographical position of many of the islands forming a portion of that colony, vessels employed in such fisheries are, in the prosecution of their business, sometimes within and sometimes beyond the territorial jurisdiction of Queensland: And whereas it is expedient that the provisions of the said acts should extend and apply to such vessels during all the time during which they are so employed, and that for that purpose the provisions of said acts, so far as they are applicable to extraterritorial waters, should be extended to such waters by an act of the Federal Council of Australasia:

Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Federal Council of Australasia, assembled at Hobart, in the Colony of Tasmania, and by the authority of the same, as follows:

1. This act may be cited as "The Queensland pearl-shell and bêche-de-mer fisheries (extraterritorial) Act of 1888," and shall commence and take effect on and from the date of Her Majesty's assent thereto being proclaimed in Queensland.

2. In this act the following terms shall, unless the context otherwise indicates, have the meanings set against them respectively; that is to say—"Australasian waters adjacent to Queensland." All Australasian waters within the limits described in the schedule to this act, exclusive of waters within the territorial jurisdiction of the Colony of Queensland.

19. This act applies only to British ships, and boats attached to British ships.

(The schedule defines a large expanse of the sea, the most distant point of which is 250 nautical miles from the coast.)

1888, February 15.—*Treaty with the United States, for the settlement of the fishery question on the Atlantic coast of North America, fixing three marine miles as the general extent of coastal waters.*¹

1888, July 5.—*Act of Parliament to carry into effect an international convention respecting the liquor traffic in the North Sea.*²

The expression "territorial waters" shall mean the territorial waters of Her Majesty's dominions as defined by the Territorial Waters Jurisdiction Act, 1878.³

¹ See *post*, p. 675.

² Hertslet, *Commercial Treaties*, vol. 18, p. 479; 51 & 52 Victoria, cap. 18.

³ One marine league. See *ante*, p. 485.

1888, November 27.—*Treaty of commerce and navigation with Mexico.*¹

IV. . . . The two contracting parties agree to consider, as a limit of their territorial waters on their respective coasts, the distance of *three marine leagues*, reckoned from the line of low-water mark. Nevertheless, this stipulation shall have no effect, excepting in what may relate to the observance and application of the custom-house regulations and the measures for preventing smuggling, and cannot be extended to other questions of civil or criminal jurisdiction, or of international maritime law.

1889, February 4.—*Schedule attached to an Act to regulate the pearl-shell and bêche-de-mer fisheries in Australasian waters adjacent to the Colony of Western Australia.*²

Whereas by certain acts of the Legislative Council of Western Australia provision has been made for regulating the pearl-shell fishery in the territorial waters of that colony; And whereas vessels employed in such fishery are, in the prosecution of their business, sometimes within and sometimes beyond the territorial jurisdiction of Western Australia; And whereas it is expedient that the provisions of the said acts should extend and apply to such vessels during all the time during which they are so employed, and that for that purpose the provisions of the said acts, so far as they are applicable to extraterritorial waters, should be extended to such waters by an act of the Federal Council of Australasia; And whereas it is desirable that the provisions of the said acts should apply to persons and vessels engaged in the bêche-de-mer fishery in like manner as to the pearl-shell fishery:

Be it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Federal Council of Australasia, assembled at Hobart, in the colony of Tasmania, and by the authority of the same, as follows:

1. This act may be cited as "The Western Australian pearl-shell and bêche-de-mer fisheries 'extraterritorial' Act of 1889," and shall take effect on and from the date of Her Majesty's assent thereto being proclaimed in Western Australia.

2. This act applies only to British ships and boats attached to British ships.

3. In this act the following terms shall, unless the context otherwise indicates, have the meanings set against them respectively; that is to say:

¹ Hertslet, *Commercial Treaties*, vol. 18, p. 857.

² Fur Seal Arbitration, *Proceedings of the Tribunal of Arbitration at Paris, 1893*, vol. 2, p. 468.

“Australasian waters adjacent to Western Australia.” All Australasian waters within the limits described in the schedule to this act, exclusive of waters within the territorial jurisdiction of the colony of Western Australia.¹

1889, July 26.—*Act of Parliament to amend the herring fishery (Scotland) acts; and for other purposes relating thereto (maritime jurisdiction).*²

6 (1). It shall not be lawful to use the method of fishing known as beam trawling or otter trawling within *three miles* of low-water mark of any part of the coast of Scotland, nor within the waters specified in the schedule hereto annexed, save only between such points on the coast or within such other defined areas as may from time to time be permitted by by-laws of the Fishery Board for Scotland, and subject to any conditions or regulations made by those by-laws.

1890, November 19.—*An ordinance relating to chanks.*

9. It shall not be lawful for any person to fish for, dive for, or collect chanks, *bêche-de-mer*, coral or shells in the seas within the limits defined in Schedule B hereto, and every person who shall fish for, dive for, or collect, or who shall use or employ any boat, canoe, raft or vessel in the collection of chanks, *bêche-de-mer*, coral, or shells in the said seas, shall be guilty of an offence punishable with simple or rigorous imprisonment for a period not exceeding six months, or with fine not exceeding one hundred rupees, or with both; and every boat, canoe, raft, or vessel so employed as aforesaid, together with all chanks, *bêche-de-mer*, coral, or shells unlawfully collected, shall be forfeited.

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SCHEDULE B

Eastward of a straight line drawn from a point *six miles* westward of Talaimannar to a point *six miles* westward from the shore *two miles* south of Talaivilla.

¹ The schedule attached to this act defines an area of the sea which extends as far as *six hundred miles* from the coast.

² Hertslet, *Commercial Treaties*, vol. 18, p. 501; 52 & 53 Victoria, c. 28.

³ Fur Seal Arbitration, *Proceedings of the Tribunal of Arbitration at Paris*, 1893, vol. 2, pp. 466, 467.

1893, April 30–May 12.—Draft agreement between Great Britain and Russia, relative to the seal fisheries.¹

ARTICLE 1. During the year ending December 31, 1893, Her Britannic Majesty's Government will prohibit British subjects from killing or hunting seals within the following limits:

a. Within a zone of *ten marine miles* following the sinuosities of the Russian coasts which border on Bering Sea and any other part of the North Pacific Ocean.

b. Within a zone of *thirty marine miles* around the Komandorsky Islands and round Tulénnew (Robben Island).

1893, May 10, 22, 30.—Agreement between Great Britain and Russia relative to seal fisheries.²

During the year ending 31st December, 1893, the English Government will prohibit their subjects from hunting seals within a zone of *ten marine miles* on all the Russian coasts of Bering Sea and the North Pacific Ocean; as well as within a zone of *thirty marine miles* round the Komandorsky Islands and Tulénnew (Robben Island).

1893, July 4.—British Order in Council, prohibiting the catching of seals by British ships in the parts of the North Pacific Ocean specified in the agreement with Russia of May, 1893, from July 4, 1893, to January 1, 1894.³

1. From and after the 4th day of July, 1893, until the 1st day of January, 1894, the catching of seals by British ships is hereby prohibited within such parts of the seas to which the recited act applies as are comprised within the following zone; that is to say, (i) a zone of *ten marine miles* on all the Russian coasts of Bering Sea and the North Pacific Ocean, and (ii) a zone of *thirty marine miles* round the Komandorsky Islands and Tulénnew (Robben Island).

1893, August 15.—Award of the tribunal in the Bering Sea arbitration with the United States, establishing the ordinary three-mile limit.⁴

1894, January 29.—British Order in Council, prohibiting the catching of seals by British ships in certain parts of the North Pacific Ocean.⁵

1. From and after the date of the present order until Her Majesty in Council shall otherwise direct, the catching of seals by British

¹ Hertslet, *Commercial Treaties*, vol. 19, p. 818.

² *Ibid.*, p. 820.

³ *Ibid.*, p. 822.

⁴ See *post*, p. 676.

⁵ *British and Foreign State Papers*, vol. 86, p. 86.

ships is hereby prohibited within such parts of the seas to which the recited act applies as are comprised within the following zones, that is to say:

(1) A zone of *ten marine miles* on all the Russian coasts of Bering Sea and the North Pacific Ocean; and

(2) A zone of *thirty marine miles* round the Komandorsky Islands and Tulénew (Robben Island).

1895, May 21, 22, 24, 28; July 3.—The Imperial Japanese Government, plaintiff, and the Peninsular and Oriental Steam Navigation Company, defendants: on appeal from the Supreme Court for China and Japan at Shanghai (in Admiralty).¹

Appeal from an order of the Supreme Court (Nov. 25, 1893) varying an order of her Britannic Majesty's Court for Japan in Admiralty (June 29, 1893), and giving leave to the respondents to file a counterclaim by cross petition in the appellants' suit, which was brought to recover damages for a maritime collision under the circumstances stated in the judgment of their Lordships.

The collision occurred in Gogo Shima Straits at a part where they are about two miles wide, between the Japanese islands of Musuki and Gogo, and the straits in question form part of what is commonly called or known as the "Inland Sea" of Japan, and is about 240 miles long from east to west. There are four entrances from the ocean to that "Inland Sea," two being very narrow, the third under two miles wide, and the fourth having two branches, the widest being about four miles wide. In this "Inland Sea" are several islands, that of Gogo above mentioned being near the northern shore of Shikoku, which is one of the four large islands of Japan, and forms the southern boundary of the eastern portion of the said "Inland Sea," the place where the collision happened being within three miles from the nearest part of Shikoku.

The first court refused leave on the ground that the place where the collision occurred was within the Empire of Japan, that accordingly the law of Japan was to be applied to the collision, and that as by that law the Emperor was not liable for the negligent acts of his servants he could not be sued in a British court for damages resulting therefrom.

The Supreme Court found that the right of vessels of other nations than Japan to enter into and pass through or navigate the "Inland Sea" had been asserted by England, France, Holland, and the United States, and admitted by the Government of Japan; that the place of collision was on the highway of nations, and was constantly traversed or passed, not only by vessels of all nations going to or from

¹ *Law Reports, Appeal Cases*, vol. 20, pp. 644, 650.

ports in Japan, but also by such vessels when going on voyages from other countries than Japan to some other such countries. It then based its judgment upon these grounds: First, that its rules of procedure and the orders in council warranted an order giving leave to file the counterclaim, and to order security to be given, and that those rules and orders did not exceed the provisions of the treaties; second, that apart from the orders in council the court had inherent jurisdiction to allow the counterclaim to be filed, and to order the security to be given; third, that the collision did not occur within the limits of the Empire of Japan, but on the high sea, where courts of admiralty have jurisdiction and maritime law applies.

The judgment of their Lordships was delivered by LORD HERSCHELL L. C.:

This appeal raises a question of considerable importance in regard to the jurisdiction possessed by the British consular courts in China and Japan. The facts lie in a narrow compass.

In November, 1892, a collision occurred between the Emperor of Japan's steam cruiser *Chishima* and the *Ravenna*, a steamer belonging to the respondents, in the Gogo Shima Straits, near the coast of Japan. The *Chishima* sank almost immediately, and the *Ravenna* sustained some damage.

In May, 1893, the appellants filed a petition against the respondents in Her Majesty's Court for Japan, alleging that the disaster was due to the default and negligence of those on board the *Ravenna*, and was not attributable to any one on board the *Chishima*, and that the damage occasioned to the appellants was \$850,000.

The respondents in their answer alleged that those on board the *Chishima* were solely to blame for the collision; that no blame was attributable to those on board the *Ravenna*; and that they had sustained loss by reason of the collision amounting to \$100,000.

On the 6th of June, 1893, the respondents moved the court for leave to file a counterclaim in the action, by cross petition, for the recovery of \$100,000 from the appellants, and also for an order that the suit and counterclaim should be heard together, and that the appellants should be required to give security (by deposit or otherwise) to abide by and perform the decision of the court upon the counterclaim.

The learned judge refused leave to file the counterclaim. He based his judgment upon the ground that the collision had occurred within *three miles* of the coast of Japan, in the territorial waters of that country; that the liability of the Emperor of Japan, as owner of the *Chishima*, for the negligent acts of the officers and crew of that vessel must therefore be regulated by the law of Japan; and that as, by that

law, the Emperor of Japan was not liable for such negligent acts no action could be maintained against him in respect of them, and consequently no counterclaim ought to be allowed, even if, apart from this objection, it would have been competent for the court to entertain it.

On appeal, Her Majesty's Supreme Court for China and Japan reversed the judgment of the Court for Japan, and made the order prayed for by the respondents.

The Chief Justice dissented from the law laid down in the court below. Although the place of the collision might have been within the territorial waters of Japan he thought it was "undoubtedly upon the highway of nations," and that this being so it must be deemed to have taken place upon the high seas where the law maritime applied, and that by the law maritime the owner of a ship doing damage to another is liable for the negligence of his servants.

In the view which their Lordships take it is unnecessary to decide the question on which the Chief Justice of the Supreme Court and the judge of the Lower Court differed. They think it, however, right to say that they must not be regarded as sanctioning the very broad propositions affirmed by the Chief Justice, which are obviously open to serious controversy.

In order to determine whether the order made by the Supreme Court can be sustained, their Lordships think it necessary to inquire into the origin of the extraterritorial jurisdiction exercised by Her Majesty's Consular Courts in Japan, and to ascertain the limits of that jurisdiction.

Their Lordships will humbly advise Her Majesty that the order appealed from should be reversed, and the order of Her Majesty's Court for Japan restored, and that the respondents should pay the costs here and in the Supreme Court.

1895, July 6.—Act of Parliament, for the better regulation of Scottish sea fisheries.¹

10. (1) The Fishery Board may, by by-law or by-laws, direct that the methods of fishing known as beam trawling and otter trawling shall not be used in any area or areas under the jurisdiction of Her Majesty, within *thirteen miles* of the Scottish coast, to be defined in such by-law and may, from time to time, make, alter, and revoke by-laws for the purposes of this section. Provided that the powers conferred in this section shall not be exercised in respect to any areas under Her Majesty's jurisdiction lying opposite to any part of the

¹ Hertslet, *Commercial Treaties*, vol. 20, p. 608; 58 & 59 Victoria, cap. 42.

coasts of England, Ireland, or the Isle of Man, within *thirteen miles* thereof.

(3) Provided that no area of sea within the said limit of *thirteen miles* shall be deemed to be under the jurisdiction of Her Majesty for the purposes of this section unless the powers conferred thereby shall have been accepted as binding upon their own subjects with respect to such area by all the States signatories of the North Sea Convention, 1882.

1897, February 13/25.—Award of the arbitrator, F. Martens, in the case of the "Costa Rica Packet" arbitration with Great Britain.¹

In virtue of the high duties of arbitrator conferred by supreme order of my august master, His Majesty the Emperor Nicholas II of all the Russias, F. Martens, privy councillor, permanent member of the council of the Russian Ministry of Foreign Affairs, and emeritus professor, in accordance with the convention of the 16th May 1895, concluded between the Government of Her Majesty the Queen of Great Britain and Ireland, Empress of India, and the Government of Her Majesty the Queen of the Netherlands, on the subject of the difference which has arisen between the two Governments in respect of the detention of Mr. Carpenter, captain of the Australian whaler the *Costa Rica Packet*—

Having duly examined and maturely weighed the documents which have been produced on either side with regard to the indemnity claimed by the Government of Her Britannic Majesty from the Government of the Netherlands on behalf of Captain Carpenter, and the officers, crew, and owners of the vessel *Costa Rica Packet*—

Animated by a sincere desire to justify the great honor which has been conferred on me by an impartial and scrupulous decision, and taking into account the principles of international law applicable to the dispute which has arisen between the two high contending Governments, in order to fix the amount of the indemnity due by the Government of the Netherlands on account of the damages suffered personally by Captain Carpenter, of the *Costa Rica Packet*, as well as those that may be proved to have been suffered by the officers, crew, and owners of the aforesaid vessel, as a necessary consequence of the precautionary detention of Mr. Carpenter,

I pronounce the following award of arbitration:

Considering that the right of sovereignty of the State over territorial waters is determined by the range of cannon measured from the low-water mark;

¹ Moore, *International Arbitrations*, vol. 5, p. 4952.

That on the high seas even merchant vessels constitute detached portions of the territory of the State whose flag they bear, and, consequently, are only justiciable by their respective national authorities for acts committed on the high seas;

That the State has not only the right but even the duty of protecting and defending its nationals abroad by every means authorized by international law, when they are subjected to arbitrary proceedings or injuries committed to their prejudice;

That the sovereignty of the State and the independence of the judicial or administrative authorities could not prevail to the extent of arbitrarily suppressing the legal security, which ought to be guaranteed no less to foreigners than to natives in the territory of every civilized country;

Whereas the appropriation of the cargo of the aforesaid prauw by Mr. Carpenter having taken place on the high seas was only justiciable by English tribunals, and in nowise by Dutch tribunals;

Whereas the authorities of the Netherlands Indies, who had arrested Mr. Carpenter, in November 1891, on the charge of having committed the act in 1888 outside the territorial waters of the Netherlands Indies, abandoned of their own accord, by the decision of the Macassar council of justice, dated the 28th November 1891, the prosecution of the accused, and irrefutably established by this action the illegality of his detention, as well as of his forced transference from Ternate to Macassar;

Whereas all the papers and deeds produced go to prove the absence of any real cause for arresting Mr. Carpenter, and confirm his right to be indemnified for the losses sustained by him;

Whereas the treatment to which Mr. Carpenter was subjected in prison at Macassar appears to be unjustifiable in view of his being the subject of a civilized State, whose detention was only a precautionary measure, and that, consequently, this treatment entitles him to a fair compensation;¹

Whereas the unjustifiable detention of Captain Carpenter caused him to miss the best part of the whale-fishing season;

Whereas, on the other hand, Mr. Carpenter, on being set free, was in a position to have returned on board the ship *Costa Rica Packet*, in January 1892, at the latest, and whereas no conclusive proof has been produced by him to show that he was obliged to leave his ship

¹ Mr. Carpenter, as stated in the British case, was, on his arrival at Macassar, "placed in goal after being subjected to public and gross indignities and imprisoned in a cell for 'condemned Europeans.'"

It seems that Mr. Carpenter was an American by birth, who had been naturalized in the British dominions. (Mr. Quinby to Mr. Gresham, June 28, 1894, MS. Despatches from the Netherlands.)

until April 1892 in the port of Ternate without a master, or, still less, to sell her at a reduced price;

Whereas the owners or the captain of the ship being under an obligation, as a precaution against the occurrence of some accident to the captain, to make provision for his being replaced, the mate of the *Costa Rica Packet* ought to have been fit to take the command and to carry on the whale-fishing industry;

And whereas, thus, the losses sustained by the proprietors of the vessel *Costa Rica Packet*, the officers, and the crew, in consequence of the detention of Mr. Carpenter, are not entirely the necessary consequence of this precautionary detention;

Whereas, in so far as the indemnity to be paid to Captain Carpenter, the officers, crew, and owners of the vessel *Costa Rica Packet* is concerned, the documents produced, and, in particular, the expert opinion to which recourse has been had at Brussels, do not furnish the necessary elements for fixing the amount, and whereas a sufficient indemnity will have been given them by granting the sum of 3,150 *l.* to Captain Carpenter, the sum of 1,600 *l.* to the officers and crew, and the sum of 3,800 *l.* to the owners of the vessel *Costa Rica Packet*.

For these reasons:

I declare the Government of Her Majesty the Queen of the Netherlands responsible, and I, consequently, fix the indemnity to be paid at—

The sum total of 3,150 *l.* to Captain Carpenter.

The sum total of 1,600 *l.* to the officers and crew.

The sum total of 3,800 *l.* to the owners of the vessel *Costa Rica Packet*—

With interest on all these damages at the rate of five per cent per annum, from the 2nd November 1891, the date of the illegal arrest of Captain Carpenter, and I put the expenses at the total sum of 250 *l.* to be paid by the Government of Her Majesty the Queen of the Netherlands.

1900, May.—*British notification of the Danish Law of April 7, 1900, respecting illegal trawling in territorial waters.*¹

Notice is hereby given to British fishermen that a new law has come into force in Denmark by which the penalty for illegal trawling in the territorial waters of that country² has been increased.

Translation of the law is appended.³

¹ Hertslet, *Commercial Treaties*, vol. 21, p. 355.

² Three miles from low-water mark (*post*, p. 517).

³ For the Danish law, see *ante*, p. 516.

1901, June 24.—*Convention between Great Britain and Denmark for regulating the fisheries outside the three-mile limit in the ocean surrounding the Færø Islands and Iceland.*¹

1901, November 18.—*Treaty with the United States to facilitate the construction of a ship canal establishing protective zones of three marine miles from either end of the canal.*²

1905, June 15.—*Act of the Government of Newfoundland respecting foreign fishing vessels.*³

Be it enacted by the Governor, the Legislative Council, and House of Assembly, in legislative session convened, as follows:

1. Any justice of the peace, subcollector, preventive officer, fishery warden or constable may go on board any foreign fishing vessel being within any port on the coasts of this island or hovering in British waters within *three marine miles* of any of the coasts, bays, creeks, or harbors in this island, and may bring such foreign fishing vessel into port, may search her cargo, and may examine the master upon oath touching the cargo and voyage; and the master or person in command shall answer truly such questions as shall be put to him under a penalty not exceeding 500 dollars; and if such foreign vessel has on board any herring, caplin, squid, or other bait fishes, ice, lines, seines, or other outfits or supplies for the fishery purchased within any port on the coasts of this island or within the distance of *three marine miles* from any of the coasts, bays, creeks, or harbors of this island, or if the master of the said vessel shall have engaged, or attempted to engage, any person to form part of the crew of the said vessel in any port or on any part of the coasts of this island, or has entered such waters for any purpose not permitted by treaty or convention for the time being in force, such vessel and the tackle, rigging, apparel, furniture, stores, and cargo thereof shall be forfeited.

1906.—*Act of the Government of Canada respecting the customs.*⁴

154. If any vessel is found hovering in British waters, while within *one league* of the coasts or shores of Canada, any officer may go on board and enter into such vessel and stay on board such vessel while she remains within the limits of Canada or within *one league*

¹ See *ante*, p. 517.

² See *post*, p. 680.

³ Hertslet, *Commercial Treaties*, vol. 25, p. 872; 5 Edward VII, cap. 4.

⁴ *Revised Statutes of Canada*, 1906, chap. 48; *British and Foreign State Papers*, vol. 105, p. 46.

thereof; and, if any such vessel is bound elsewhere, and so continues hovering for the space of twenty-four hours after the master has been by such officer required to depart, such officer may bring the vessel into port and examine her cargo.

1906, March 14, April 16.—*Decision of the Supreme Court of Canada in the ship "North" v. the King.*¹

DAVIES, J. The "North" was an American fishing schooner and was found by the Dominion fishing cruiser "Kestrel" on the 8th July, 1905, fishing off the coast of British Columbia within the *three-mile limit* or zone.

On being discovered the poaching schooner immediately endeavored to escape into the high seas beyond the *three-mile limit*. She was at once pursued by the "Kestrel" and two of her boats, which were out fishing and which she was unable to pick up while endeavoring herself to escape, were captured. The schooner was not overtaken till she had passed out beyond the *three-mile limit* into the high seas. She was, when overtaken, taken possession of for illegal fishing, brought into port, libeled in the Admiralty Court, and after trial, condemned.

Some questions were raised on this appeal by Mr. Wilson as to the legality of the condemnation on the ground that the fisheries along the coast belonged to the province and not to the Dominion and that the legislation for their protection should have been provincial and not Dominion. The simple answer to such objections is that the British North America Act, 1867, conferred upon the Dominion the exclusive power of legislation with respect to seacoast and inland fisheries and that the judgment of the judicial committee in the case of *Attorney General of Canada v. Attorney General of Ontario* (1), determines affirmatively the exclusive right of the Dominion Parliament to make or authorize the making of regulations and restrictions respecting the fisheries of Canada.

1906, May 10.—*Act of the Government of Newfoundland respecting foreign fishing vessels.*²

Be it enacted by the Governor, the Legislative Council, and House of Assembly, in legislative session convened as follows:

1. Any justice of the peace, subcollector, preventive officer, fishery warden, or constable may go on board any foreign fishing vessel, being within any port on the coasts of this colony, or hovering in British waters within *three marine miles* of any of the coasts, bays,

¹ Canada, *Supreme Court Reports*, vol. 37, p. 392.

² Hertslet, *Commercial Treaties*, vol. 25, p. 875; 6 Edward VII, cap. 1.

creeks or harbors in this colony, and may bring such foreign fishing vessel into port, may search her cargo, and may examine the master upon oath touching the cargo and voyage, and the master or person in command shall answer truly such questions as shall be put to him, under a penalty not exceeding 500 dollars.

2. If any foreign fishing vessel be found within any port on the coasts of this colony, or hovering in British waters within *three marine miles* of any of the coasts, bays, creeks, or harbors in this colony, and having on board any herring, caplin, squid, or other bait fishes, ice, lines, seines, or other outfits or supplies for the fishery, purchased within any port on the coasts of this colony, or within the distance of *three marine miles* from any of the coasts, bays, creeks, or harbors of this colony; or if the master, owner, or agent of the said vessel shall have engaged, or attempted to engage, any person to form part of the crew of the said vessel in any port, or any part of the coasts, of this colony, or has entered such waters for any purpose not permitted by treaty or convention for the time being in force, the master, owner, or agent shall be liable to a penalty not exceeding 100 dollars, or such vessel and the tackle, rigging, apparel, furniture, stores, and cargo thereof shall be forfeited, as the magistrate before whom the proceeding is taken shall determine.

1906, July 19.—*Mortensen v. Peters*, High Court of Justiciary of Scotland.¹

The Lord Justice General: The facts of this case are that the appellant being a foreign subject, and master of a vessel registered in a foreign country, exercised the method of fishing known as otter trawling at a point within the Moray Firth, more than three miles from the shore, but to the west of a line drawn from Duncansby Head in Caithness to Rattray Point in Aberdeenshire; that being thereafter found within British territory, to wit, at Grimsby, he was summoned to the sheriff court at Dornoch to answer to a complaint against him for having contravened the seventh section of the Herring Fishery Act, 1889, and the by-law of the fishery board, thereunder made, and was convicted.

It is not disputed that if the appellant had been a British subject in a British ship he would have been rightly convicted. Further, in the case of *Peters v. Olsen*, when the person convicted, as here, was a foreigner in a foreign ship, the conviction was held good. The only difference in the facts in that case was that the *locus* there, was upon a certain view of the evidence, within *three miles* of a line measured across the mouth of a bay, where the bay was not more than ten miles wide, which cannot be said here. But the conviction

¹ *American Journal of International Law*, vol. 1, p. 532.

proceeded on no such consideration, but simply on the fact that the *locus* was within the limit expressly defined by the schedule of the sixth section of the Herring Fishery Act; and the three learned judges in that case did, I think, undoubtedly consider and decide the question, whether the sixth section of the Herring Fishery Act (which in this intention is the same as the seventh) was, or was not, intended to strike at foreigners as well as British subjects. But as this is a full bench, we are at liberty to reconsider that decision.

My lords, I apprehend that the question is one of construction and of construction only. In this court we have nothing to do with the question of whether the legislature has, or has not done, what foreign Powers may consider a usurpation in a question with them. Neither are we a tribunal sitting to decide whether an act of the legislature is *ultra vires* as in contravention of generally acknowledged principles of international law. For us an act of Parliament duly passed by Lords and Commons and assented to by the King is supreme, and we are bound to give effect to its terms. The counsel for the appellant advanced the proposition that statutes creating offenses must be presumed to apply (1) to British subjects; and (2) to foreign subjects in British territory; but that short of express enactment their application should not be further extended. The appellant is admittedly not a British subject, which excludes (1); and he further argued that the *locus delicti*, being in the sea beyond the *three mile* limit, was not within British territory; and that consequently the appellant was not included in the prohibition of the statute. Viewed as general propositions the two presumptions put forward by the appellant may be taken as correct. This, however, advances the matter but little, for like all presumptions they may be redargued, and the question remains whether they have been redargued on this occasion.

The first thing to be noted is that the prohibitions here, a breach of which constitutes the offense, is not an absolute prohibition against doing a certain thing, but a prohibition against doing it in a certain place. Now, when a legislature, using words of admitted generality—"It shall not be lawful," etc., "Every person who," etc.—conditions an offense by territorial limits, it creates, I think, a very strong inference that it is for the purposes specified, assuming a right to legislate for that territory against all persons whomsoever. This inference seems to me still further strengthened when it is obvious that the remedy to the mischief sought to be obtained by the prohibition would be either defeated or rendered less effective if all persons whomsoever were not affected by the enactment. It is obvious that the latter consideration applied in the present case. Whatever may be the views of any one as to the propriety or expediency of stopping trawling, the enactment shows on the face of it that it

contemplates such stopping; and it would be most clearly ineffective to debar trawling by the British subject while the subjects of other nations were allowed so to fish.

It is said by the appellant that all this must give way to the consideration that international law has firmly fixed that a *locus* such as this is beyond the limits of territorial sovereignty; and that consequently it is not to be thought that in such a place the legislature could seek to affect any but the King's subjects.

It is a trite observation that there is no such thing as a standard of international law, extraneous to the domestic law of a Kingdom, to which appeal may be made. International law, so far as this court is concerned, is the body of doctrine regarding the international rights and duties of States which has been adopted and made part of the law of Scotland. Now, can it be said to be clear by the law of Scotland that the *locus* here is beyond what the legislature may assert right to affect by legislation against all whomsoever for the purpose of regulating methods of fishing?

I do not think I need say anything about what is known as the *three-mile* limit. It may be assumed that within the *three miles* the territorial sovereignty would be sufficient to cover any such legislation as the present. It is enough to say that that is not a proof of the counter proposition that outside the *three miles* no such result could be looked for. The *locus*, although outside the *three-mile* limit, is within the bay known as the Moray Firth, and the Moray Firth, says the respondent, is *intra fauces terræ*. Now, I cannot say that there is any definition of what *fauces terræ* exactly are. But there are at least three points which go far to show that this spot might be considered as lying therein.

(1) The dicta of the Scottish institutional writers seem to show that it would be no usurpation, according to the law of Scotland, so to consider it.

Thus, Stair, II, i, 5:

The vast ocean is common to all mankind as to navigation and fishing, which are the only uses thereof, because it is not capable of bounds; but when the sea is inclosed in bays, creeks or otherwise is capable of any bounds or meiths as within the points of such lands, or within the view of such shores, then it may become proper, but with the reservation of passage for commerce as in the land.

And Bell, Pr. § 639:

The sovereign . . . is proprietor of the narrow seas within cannon shot of the land, and the firths, gulfs, and bays around the Kingdom.

(2) The same statute puts forward claims to what are at least analogous places. If attention is paid to the schedule appended to

§6, many places will be found far beyond the *three-mile* limit, e. g., the Firth of Clyde near its mouth. I am not ignoring that it may be said that this in one sense is proving *idem per idem*, but none the less I do not think the fact can be ignored.

(3) There are many instances to be found in decided cases where the right of a nation to legislate for waters more or less landlocked or landembraced, although beyond the *three-mile* limit, has been admitted.

They will be found collected in the case of the Direct United States Cable Company *v.* Anglo-American Telegraph Company, L. R. 2 App. Cas. 394, the bay there in question being Conception Bay, which has a width at the mouth of rather more than twenty miles.

It seems to me, therefore, without laying down the proposition that the Moray Firth is for every purpose within the territorial sovereignty, it can at least be clearly said that the appellant cannot make out his proposition that it is inconceivable that the British legislature should attempt for fishery regulation to legislate against all and sundry in such a place. And if that is so, then I revert to the considerations already stated, which, as a matter of construction, make me think that it did so legislate.

An argument was based on the terms of the North Sea Convention—which had been concluded a few years before this act was passed, and which defines “exclusive fishery limits” in a manner which excludes this part of the Moray Firth. But I do not think any argument can be drawn from that definition, for the simple reason that the convention as a whole does not deal with the subject matter here in question, viz: mode of fishing.

If it had been attempted to infer from the terms of the act a prohibition of which the effect was to give to subjects and deny to foreigners the right to fish, then the convention might be apt to suggest an argument against such a construction. But that is not so. Subjects and foreigners are *ex hypothesi* in this matter treated alike.

I am therefore of opinion that the conviction was right; that both questions should be answered in the affirmative, and that the appeal should be dismissed.

1909, February 16.—*Egyptian customs regulation*.¹

2. *Zone of supervision*.—Deposit and transportation of goods which have crossed the customs line are subject to the supervision of customs officials for a distance of *two kilometers* from the frontier on land or from the coast-line on sea, as well as from the two banks of the Suez ship canal and from the lakes which said canal crosses.

¹ Translation. For the French text, see *British and Foreign State Papers*, vol. 100, p. 884.

Outside these limits the transportation of goods may be freely effected; nevertheless, goods fraudulently removed and kept in view by the public officials may be seized even after they have crossed the zone of supervision.

The following goods may also be seized throughout all Egyptian territory: Interdicted goods, goods whose sale is monopolized by the Government, as well as tobacco or tombac circulating in violation of the regulations.

For ships the zone of supervision extends to a distance of *ten kilometers* from the coast-line. Caravans crossing the desert and suspected of being engaged in illegal traffic are subject to searches and examinations by the customs officials.

1909, September 20.—Act of Parliament to prohibit the landing and selling in the United Kingdom of fish caught in prohibited areas of the sea adjoining Scotland or Ireland.¹

1. From and after the expiration of one month from the passing of this act it shall not be lawful to land or sell in the United Kingdom any fish caught by the methods of fishing known as beam trawling and otter trawling within prohibited areas, as defined in this act; . . .

5. In this act the expression "prohibited area" means—

(1) Any waters within which the methods of fishing known as beam trawling and otter trawling are prohibited by the Herring Fishery (Scotland) Act, 1889, or any by-law made thereunder, but does not include any such waters within *three miles* from low-water mark of any part of the coast of Scotland, unless such waters form part of an area which, as defined for the purposes of the said act or by-law, extends more than *three miles* from low-water mark as aforesaid;

(2) Any waters within which the use of the method of fishing known as beam trawling or otter trawling in or from any steamer or steamship or vessel propelled by steam is prohibited by any by-law made under Section 3 of the Steam Trawling (Ireland) Act, 1889, but does not include any such waters within *three miles* from low-water mark of any part of the coast of Ireland, unless such waters form part of an area which, as defined for the purposes of the by-law, extends more than *three miles* from low-water mark as aforesaid.

1910, September 7.—Award of the tribunal in the North Atlantic coast fisheries arbitration with the United States in which three marine miles is mentioned as the extent of the marginal sea.²

¹ Hertslet, *Commercial Treaties*, vol. 26, p. 374.

² See *post*, p. 681.

1911, February 9.—Debate in the House of Commons.¹

Mr. STANIER asked whether the Government had any information as to Russia having introduced a bill into the Duma, seeking to enlarge her territorial waters for fishing purposes from the recognized *three-mile limit* to *twelve miles*; and, if so, if this is against treaty rights?

Mr. McKINNON WOOD: The answer to the first part of the question is in the affirmative. The proposed extension of the exclusive fishery limits of Russia from *three* to *twelve miles* would be contrary, not to any treaty between the United Kingdom and that country, but to the generally accepted doctrines of international law.

Sir GEORGE DOUGHTY asked whether any, and, if so, what representations have been made to the Russian Government on the bill introduced into the Russian Duma seeking to enlarge the territorial waters for fishing purposes from the recognised *three-mile limit* to *twelve miles* in the White Sea and the Sea of Archangel; and whether he is aware that if such bill is allowed to become law a serious blow will be struck at the British fishing industry and a great injury done to the fish-consuming public of Great Britain by further restricting the area from which their supplies are drawn.

Mr. McKINNON WOOD: His Majesty's Ambassador at St. Petersburg, who had already made representations to the Russian Minister for Foreign Affairs in this matter, has recently been instructed to address an official protest to the Russian Government against the proposal to extend the fishery limits of Russia beyond the ordinary distance of *three miles* from shore, as being contrary to the generally accepted doctrines of international law. The Secretary of State is fully alive to the importance of the British interests involved in this question.

1911, February 13.—Debates in the House of Commons.²

Mr. ROBERT HARCOURT asked the Under-Secretary for Foreign Affairs whether, in stating the attitude of His Majesty's Government towards the action recently taken by the Russian Government as to the White Sea fisheries, he had considered the effect on the fisheries around the coasts of these islands of any binding declaration perpetuating an extreme limit of *three miles* within which trawling could be regulated; whether he had received any communications on the subject from representatives of line fishermen; whether he was aware that recent writers on international law argue in favor of a more extensive jurisdiction over destructive methods of fishing; and

¹ Hansard's *Parliamentary Debates*, House of Commons, 1911, vol. 21, p. 421.

² *Ibid.*, p. 674.

whether there was any likelihood of the question of territorial waters being reopened to international discussion?

Mr. McKINNON WOOD: My attention has been called to the position of line fishermen in this country, and to arguments in favor of control of methods of fishing beyond the *three-mile* limit; but in dealing with this question it is necessary for His Majesty's Government to take into consideration at the same time the numerous other interests which are affected. Until the full result of the international investigations, which are now proceeding, and the nature of the measures which may be recommended, are known, it would be premature to express any opinion on the question of concluding an international agreement for the control of methods of fishing beyond the *three-mile* limit.

NORTH SEA FISHERIES.

Mr. CATHCART WASON asked the Under-Secretary for Foreign Affairs whether, in view of the recent claim by Russia to extend the *three-mile* limit to *twelve miles*, he will consider the expediency of raising the question before the Hague Tribunal for the purpose not only of effecting an amicable understanding between the North Sea Powers, but also for protecting and developing the fishing grounds of each country concerned?

Mr. McKINNON WOOD: I would refer my honorable friend to the answer I have just given to my honorable friend the member for the Montrose Burghs.

Mr. CATHCART WASON: Do the Government recognize the right of any State to fix the limit of territorial waters beyond the *range of gun fire*?

Mr. McKINNON WOOD: No, sir; we do not recognize that right.

1911, February 15.—*Debates in the House of Commons.*¹

RUSSIAN FISHERY RIGHTS.

Mr. CATHCART WASON asked whether any of the North Sea Powers as well as Great Britain have entered their protests against the claims put forward by Russia to extend their territorial waters to limit of *range of modern artillery*?

Mr. McKINNON WOOD: I presume that the honorable member refers to the bill at present before the Duma extending the limits of territorial waters along the northern coasts of Russia to *twelve miles* in fishery matters. I am not aware that any other Powers, besides Great Britain have yet protested against it.

¹ Hansard's *Parliamentary Debates*, House of Commons, 1911, vol. 21, p. 1038.

1911, February 16.—*Debates in the House of Commons.*¹

FOREIGN FISHING VESSELS (THREE-MILE LIMIT).

Mr. O'SHEE asked the Secretary of State for Foreign Affairs whether there is anything in international law to prevent Parliament from increasing the limit of the area within which steam trawling is prohibited to *five miles* instead of *three miles* from low-water mark?

SIR E. GREY: It would be contrary to a generally accepted principle of international law to prohibit foreign fishing vessels from trawling beyond *three miles* from low-water mark.

1912, July 20.—*Agreement with the United States adopting, with certain modifications, the rules and method of procedure recommended in the award of September 7, 1910, of the North Atlantic coast fisheries arbitration, in which three marine miles was mentioned as the extent of the marginal sea.*²

1917, February 13.—*Notification of mined areas.*³

North Sea.—Caution with regard to dangerous area.

Caution.—In view of the unrestricted warfare carried on by Germany at sea by means of mines and submarines not only against the allied Powers, but also against neutral shipping, and the fact that merchant ships are constantly sunk without regard to the ultimate safety of their crews, His Majesty's Government give notice that on and after February 7, 1917, the undermentioned area in the North Sea will be rendered dangerous to all shipping by operations against the enemy, and it should therefore be avoided.

Dangerous area.—The area comprising all the waters except Netherland and Danish territorial waters lying to the southward and eastward of a line commencing *four miles* from the coast of Jutland in latitude 56 degrees north, longitude 8 degrees east, and passing through the following positions: Latitude 56 degrees north, longitude 6 degrees east, and latitude 54 degrees 45' north, longitude 4 degrees 30' east, thence to a position in latitude 53 degrees 27' north, longitude 5 degrees east, *seven miles* from the coast of The Netherlands.

To meet the needs of the coastal traffic which can not strictly confine itself to territorial waters owing to navigational difficulties, it will be safe to navigate between the coast of Jutland and a line passing through the following positions: Latitude 56 degrees north, longitude 8 degrees east, latitude 55 degrees 40' north, longitude

¹ Hansard's *Parliamentary Debates*, House of Commons, 1911, vol. 21, p. 1422.

² See *post*, p. 694.

³ U. S. Naval War College, *International Law Documents*, 1917, p. 133.

8 degrees east, latitude 55 degrees 36' north, longitude 7 degrees 15' east, latitude 55 degrees 32' north, longitude 7 degrees 15' east, latitude 55 degrees 22' north, longitude 7 degrees 45' east, latitude 55 degrees 19' north, longitude 8 degrees 4' east, latitude 55 degrees 22' north, longitude 8 degrees 19' east, which is *three miles* from the coast of Fano Island.

Also a safe passage will be left along the Netherland coast southward of a line joining the following positions: Latitude 53 degrees 27' north, longitude 5 degrees east, latitude 53 degrees 31½' north, longitude 5 degrees 30' east, latitude 53 degrees 34' north, longitude 6 degrees east, latitude 53 degrees 39' north, longitude 6 degrees 23' east.

*1917, April 27.—Notification of the extension of mined area.*¹

Admiralty Notice 434, dated April 26, cancels No. 319, entitled caution with regard to dangerous area. New notice repeats former preamble and states that on and after May 3, 1917, will be further extended as undermentioned.

Dangerous area.—The area comprising all the waters except Netherland and Danish territorial waters lying to the southward and eastward of a line commencing *three miles* from the coast of Jutland on the parallel of latitude 56 degrees north, and passing through the following positions: First. Latitude 56 degrees north, longitude 6 degrees east. Second. Latitude 54 degrees 45' north, longitude 4 degrees 30' east. Third. Latitude 53 degrees 15' north, longitude 4 degrees 30' east. Fourth. Latitude 53 degrees 23' north, longitude 4 degrees 50' east. Fifth. Latitude 53 degrees 23' north, longitude 5 degrees 01' east. Sixth. Latitude 53 degrees 25' north, longitude 5 degrees, 05½' east, and from thence to the eastward, following the limit of Netherland territorial waters.

HAWAII

*1854, May 16.—Proclamation of the King of the Hawaiian Islands declaring the neutrality of his dominions in the war between Great Britain, France, Turkey, and Russia.*²

Be it known, to all whom it may concern, that we, Kamehameha III, King of the Hawaiian Islands, hereby proclaim our entire neutrality in the war now pending between the great maritime Powers of Europe; that our neutrality is to be respected by all belligerents, to the full extent of our jurisdiction, which by our fundamental laws

¹ U. S. Naval War College, *International Law Documents*, 1917, p. 134.

² Hertslet, *Commercial Treaties*, vol. 14, p. 380.

is to the distance of *one marine league* surrounding each of our islands of Hawaii, Maui, Kahoolawe, Lanai, Molokai, Oahu, Kauai, and Niihau, commencing at low-water mark on each of the respective coasts of said islands, and includes all the channels passing between and dividing said islands from island to island; that all captures and seizures made within our said jurisdiction are unlawful; and that the protection and hospitality of our ports, harbors, and roads shall be equally extended to all the belligerents, so long as they respect our neutrality.

*1877, May 29.—Proclamation of neutrality in the war between Russia and Turkey.*¹

Now, therefore, we, Kalakaua, by the grace of God, King of the Hawaiian Islands, do hereby declare and proclaim the neutrality of this kingdom, its subjects, and of all persons within its territory and jurisdiction, in the war now existing or impending between the Great Powers of Europe; that the neutrality is to be respected by all belligerents to the full extent of our jurisdiction, including not less than *one marine league* from the low-water mark on the respective coasts of the islands composing this Kingdom, and also all its ports, harbors, bays, gulfs, estuaries, and arms of the sea cut off by lines drawn from one headland to another; and that all captures and seizures, enlistments, or other acts in violation of our neutrality within our jurisdiction are unlawful.

ITALY

*1740, April 7.—Treaty of peace between the Two Sicilies and the Ottoman Empire forbidding captures or interference with commerce within sight of the coasts.*²

*1778, August 1.—Regulations of the Grand Duchy of Tuscany relating to navigation and commerce in time of war.*³

ARTICLE 1. No act of hostility between belligerent Powers can be committed within the port and along the coast of Leghorn and in the waters bounded on the east and west by the shore, the lighthouse, and the line of the Rock of Meloria; and in the seas adjacent to the other ports, bays, lighthouses and shores of the Grand Duchy, no act of hostility can be committed within *cannon range*, and consequently

¹ *British and Foreign State Papers*, vol. 68, p. 785.

² See *post*, p. 629.

³ Translation. For the French text, see Martens, *Recueil de traités*, 2d ed., vol. 3, p. 25.

within that distance is forbidden any sort of depredation, pursuit, summons, visit and generally any sort of act of violence and supremacy; vessels of all nations must there enjoy entire security in virtue of the protection that we accord them in the seas adjacent to our Grand Duchy.

1779, March 4.—Edict of the Pope relating to navigation and commerce in time of war.¹

PREAMBLE. His Holiness Pope Pius VI . . . is persuaded that the Powers at war and all the ships bearing their flags will respond to this declaration of equality and perfect neutrality, and exercise with regard to the ports, coasts, and adjacent seas of Papal States the reserve and respect that are observed in similar cases by the general custom of all nations towards neutral Powers. He consequently does not doubt that they will not commit either there or generally within the distance of *cannon range* from the shore any act of hostility, depredation . . .

1779, July 1.—Edict of the Republic of Genoa concerning navigation and commerce in time of war.²

ARTICLE 1. No act of hostility between belligerent Powers can be committed in the ports, gulfs, and along the coasts of our dominion within *cannon range*, and consequently it is forbidden in that area to commit any kind of depredation, pursuit, summons, visit, . . .

1779, July 1.—Edict of the Republic of Venice.³

ARTICLE 1. No hostilities shall be carried on between the belligerent Powers in the harbors, roadsteads, and shores of our dominions in the distance within the *range of cannon*.

1779, September 9.—Edict of the Republic of Venice concerning navigation and commerce in time of war.⁴

ARTICLE 9. Consequently no act of hostility or act of force or authority, such as prize, pursuit, summons, visit, or other act of

¹ Translation. For the French text, see Martens, *Recueil de traités*, 2d ed., vol. 3, p. 53.

² Translation. For the French text, see *ibid.*, p. 65.

³ See Nuger, *ante*, p. 301, note 3.

⁴ Translation. For the French text, see Martens, *ibid.*, p. 79.

superiority over vessels of any description or flag, can be committed in the ports, roadsteads, and along the coasts of our dominion and in all the adjacent seas for at least the distance of the *range of large cannon*; all vessels having a right to entire security and tranquillity in this neutral vicinage.

*1787, January 6/17.—Treaty of commerce between Russia and the Two Sicilies.*¹

ARTICLE 19. In addition, the two High Contracting Parties, in order to obviate the possibility of any misunderstanding between them and to admit to each other at the same time an interesting principle of the law of nations concerning neutral navigation, have agreed that whenever either of them goes to war with any other Power, it may attack enemy vessels only beyond *cannon range* along the coasts of the other Power which remains neutral.

Absolute neutrality shall also be observed in the ports, harbors, gulfs, and all waters without distinction that are comprised under the designation of closed waters.

*1787, January 17.—Treaty between Naples and Russia, establishing cannon range as the extent of the zone of neutrality.*²

ARTICLE 19. The Contracting Parties shall not attack the ships of their enemies *within cannon range* of the coasts of their allies.

*1866, June 20.—Instructions from the Minister for Marine Affairs to all general, superior and subaltern officers, commanding the navy, the squadrons and the vessels on service.*³

IV. You will bear in mind that you must abstain from any act of hostility whatever in the ports and in the territorial waters of neutral Powers; remembering that the limits of the territorial waters extend to the distance of a *cannon shot* from the shore.

*1885, August 19.—Decision of the Court of Cassation placing the extent of the territorial sea at four or five miles.*⁴

An accident had made it impossible for the French ship, the *Neustrie*, to continue its voyage, momentarily. It was then in the Italian territorial waters, a short distance from the coast. The captain of

¹ Translation. For the French text, see Martens, *Recueil de traités*, 2d ed., vol. 4, p. 237.

² Translation. For the French text, see Arnold Ræstad, *La mer territoriale*, p. 133 and note 2.

³ *British and Foreign State Papers*, vol. 58, p. 307.

⁴ Translation. For the French text, see *Journal du droit international privé et de la jurisprudence comparée*, vol. 14, p. 241.

the *Liebenstein* of the German *Hansa* Company lent it his assistance and towed it to Genoa. The Hansa claimed an indemnity for the rescue, calculated and determined to conform with rules laid down by the German law, the national law of the rescuing ship.

The court decided: That the question here would not be one of a real rescue, the *Neustrie* merely having had to resort to being towed; that the *Liebenstein* had simply given relief and assistance; that this assistance, having been given at a distance of *four or five miles* from Cape Mele, it was within the extent of the territorial sea of Italy; that by reason of this circumstance, and conforming to the principles in use in international questions, it is the Italian law and not the national law of rescue which should serve to determine the amount of indemnity for rescue.

1891, December 6.—*Treaty of commerce and navigation with Austria-Hungary.*¹

ADDITIONAL ARTICLES 17 and 18. § 2. While expressly maintaining in principle an exclusive fishing right along the coast to the subjects of the country, there shall be mutually granted by both parties, with due regard to the particular local circumstances and, on the part of Austria-Hungary, with due regard furthermore to the concessions made in return by Italy, purely as an exception and for the duration of the treaty, to the Austrian or Hungarian and Italian inhabitants on the shores of the Adriatic the right to fish along the coasts of the other State, with the exception, however, of coral and sponge fishing, as well as the fisheries, to the distance of *one nautical mile*, which are reserved exclusively to the inhabitants of the coast.

1892, February 1.—*Commercial convention with Egypt.*²

ARTICLE 12. . . . In case there is suspicion of the carrying of contraband, the Egyptian customs officials may board and seize any Italian vessel of a tonnage less than 200 outside of the waters of an Egyptian port or sailing within a radius of *ten kilometers* from shore; moreover, any Italian vessel of less than 200 tons may be boarded and seized beyond that distance, if the pursuit began within the radius of *ten kilometers* from shore.

With the exception of the cases provided for by paragraphs 3 and 4 of the present article, no Italian vessel of more than 200 tons may be boarded or seized by Egyptian customs officials.

¹ Translation. For the French text, see *British and Foreign State Papers*, vol. 83, p. 655.

² Translation. For the French text, see *ibid*, vol. 84, pp. 165–6.

1895, April 21.—Decree regulating, in time of war, the approach and sojourn of ships off maritime fortified places.¹

ARTICLE 1. Any Italian or foreign vessel, whether a war-ship or merchantship, which in time of war approaches a sea fortress in the daytime must fly its flag, and cannot come within *range of the artillery* without special permission from the commander of the place. . . .

ARTICLE 2. Every merchant vessel, Italian or belonging to an ally, and every neutral vessel, whether war-ship or merchantman, which in time of war wishes to approach a sea fortress in the daytime must stop outside the *range of the defensive works*, in so far as may be possible with reference to making signals, and hoist its name and the signal asking for a pilot, thus intimating to the signal station of the place its intention to approach. . . .

ARTICLE 5. It is absolutely forbidden in time of war, either by day or by night, for any kind of boat belonging to private persons or for the boats of neutral ships of war to circulate in the radius of the sea fortresses or within the *range of their batteries*. . . .

ARTICLE 6. It is absolutely forbidden to vessels, indicated in Article 2, to approach sea fortresses by night, or to come within *range of the coast defenses*. . . .

ARTICLE 8. The following places are sea fortresses: Vado, Savona, Genoa, Spezia, Monte Argentario (Talamone), Porto Santo Stefano, Gaeta, La Maddalena, the adjacent islands and the Sardinian coast, Messina and the anchorages on both sides of the Straits, Taranto, Ancona, Venice and the anchorages of the Lagoon.

ARTICLE 9. Whenever the above-mentioned places have to be put in a state of war, the commanders of the places, when circumstances demand it, will intimate to the ships generally, whether war-ships or merchantships, which are lying at anchor within the defended zone, to leave their anchorage in accordance with the regulations contained in the preceding articles.

Vessels receiving orders to move out must move beyond the *range of the defensive works* within twelve hours from the moment when such orders were notified on board. . . .

1908.—Rules of international maritime law in time of war issued by the office of the Chief of Staff of the Italian Ministry of the Navy.²

PARAGRAPH No. 11. The area of maritime warfare includes the high seas or other waters not under the particular jurisdiction of any State and territorial waters of the belligerents.

¹ Translation. For the Italian text, see *Raccolta delle leggi e decreti del regno d'Italia* (1895), vol. 2, p. 1235.

² Translation. For the Italian text, see *Norme di diritto internazionale marittimo in tempo di guerra* (1908), p. 7.

PARAGRAPH No. 12. It is not permissible to commit any act of hostilities *within any waters of neutral States*. Nor can the right of visit be exercised there.

PARAGRAPH No. 13. The territorial sea consists of the waters of the main land and islands over which waters extending from the coast the State has complete jurisdiction.

PARAGRAPH No. 14. Territorial waters for the purposes of the *law of war*¹ territorial waters have the extent to *cannon range* from the shore. The said extent, by customary law must be held to be fixed at *three marine miles* from the coast, beginning at low water mark.

Such extension has not been determined by international convention, but results from the tacit consent of the nations.

PARAGRAPH No. 15. Territorial waters include also, by a certain extension determined in many cases by treaties and by usage, some parts adjacent to the sea, as bays, gulfs and estuaries contained between peninsulas, in cases where such parts are situated between territories belonging to two or more States, the maritime boundaries of these latter are generally settled by conventional lines.

1909, February 16.—*Customs regulations annexed to the convention of commerce and navigation with Egypt of July 14, 1906.*²

ARTICLE 1. Customs line. The seacoasts and the boundaries touching the territories of the bordering States form the customs line.

ARTICLE 2. Zone of supervision. Storage and transportation of goods which have crossed the customs line are subject to the supervision of the customs officials to the distance of *two kilometers* from the land boundary or from the seacoast, as well as from both banks of the Suez Canal and the shores of the lakes which this canal traverses.

Outside of these limits goods may be freely transported. Nevertheless, goods fraudulently removed and kept in sight by the agents of the public authority may be seized even after they have left the zone of supervision.

The following articles also may be seized throughout Egyptian territory: Prohibited goods, goods whose sale is a State monopoly, as well as tobacco or tombac transported in contravention of the regulations.

With respect to vessels, the zone of supervision extends to a distance of *ten kilometers* from shore. Caravans crossing the desert and suspected of carrying on an illicit trade are subject to visit and verification by the customs authorities.

¹ For rights of fishery and customs territorial waters have a greater extent.

² Translation. For the French text, see *Archives diplomatiques*, vol. 110, pp. 204, 217.

ARTICLE 32. Supervision over the sea. Customs officials may within a radius of *ten kilometers* from shore board vessels of less than 200 tons' burden and require that the manifest and other documents concerning the cargo be shown them again.

If a vessel bound for an Egyptian port is without a manifest, or if there are other indications of fraud, the officials must accompany it to the nearest custom-house and draw up a report.

If any vessel of less than 200 tons' burden bound for a foreign port is found within the aforesaid radius without a manifest or with a manifest which does not give the customary information, the customs officials may escort the vessel beyond the radius of supervision, or in case there are indications of fraud, compel it to accompany them to the nearest or most practicable custom-house, and shall draw up a report.

Customs officials, officers of vessels in the Egyptian postal service, and officers of vessels belonging to the State may board any sailing or steamship of less than 200 tons' burden, which have dropped anchor or which are tacking within *ten kilometers* from shore without the justification of *force majeure*.

If customs officials, officers of vessels of the Egyptian postal service, or officers of vessels belonging to the State, go in pursuit of a vessel of less than 200 tons' burden, and the latter refuses to allow itself to be boarded, they must hoist the flag and pennant of their boat or ship and warn the vessel with a blank shot. If the vessel does not stop, a second shot consisting of a single ball or of several balls, shall be fired at the sails. After this double warning, the pursuer will shoot to hit. The pursuit may be continued and the pursued vessel may be seized beyond the *ten kilometers*.

As regards vessels of a greater tonnage than 200, supervision is confined to observing their movements along the coast. In the event of an attempt to unload goods on land or in boats, or to transship them, the aforesaid officials and officers may compel the vessel to accompany them to the nearest or most practicable custom-house and shall draw up a report on the act of contravention.

The aforesaid officials and officers may not visit any ship, vessel, or boat of war belonging to a foreign Power.

1909, August 20.—Decree relative to the approach and sojourn of ships off maritime fortified places in time of war.¹

ARTICLE 1. Whenever a maritime stronghold must be placed upon a war basis, the commandant thereof, whenever circumstances require, can ask vessels of war and of commerce at anchor in the prohibited

¹ Translation. For the Italian text, see *Raccolta delle leggi e decreti del regno d'Italia*, vol. 6, p. 5226.

zones to put to sea or to go to some such other points as are assigned them.

Vessels that receive notice to put to sea are bound to go beyond *cannon range* within twelve hours after the notice is received on board. . . .

ARTICLE 5. National merchantmen and those of allied countries, neutral war-ships and merchant vessels, in order to make themselves recognized, should fly their national flags in a well visible position as well as their names according to the international signal code.

When they wish to approach the maritime places they must stop at the maximum distance from the coast permitted by the visibility of the signals and the semaphores (and in no case less than *five miles*). . . .

1912, June 16.—*Law regulating the passage and stay of merchant vessels along Italian coasts.*¹

ARTICLE 1. The passage and sojourn of national or foreign merchantmen may be prohibited, at any time whatever and in any determined place whatever, within or without the seas of the State, when it is recognized as necessary in the interest of the national defense. For the particular purposes of the present law, the seas of the State are understood to be the zone of the sea included within *ten marine miles* of the shore. As respects gulfs and bays, the zone of ten miles is measured from a straight line drawn across the bend in the part farthest outside where the opening has a breadth not exceeding twenty miles.

JAPAN

1870, July 28.—*Proclamation of neutrality during the Franco-Prussian War.*²

The two nations may not engage in battle between ports and inland seas, nor within *three miles* from land on the high seas. Their war-ships or merchant vessels may, however, pass as heretofore.

1870, August 29.—*Revised proclamation of neutrality in the war between France and Prussia.*³

ARTICLE 1. The contending parties are not permitted to engage in hostilities in Japanese harbors or inland waters, or within a

¹ Translation. For the French and Italian texts, see *Revue générale de droit international public*, vol. 20, doc., p. 8; *Gazzetta ufficiale* of June 27, 1912, no. 151.

² MS., Department of State.

³ *British and Foreign State Papers*, vol. 61, p. 635.

distance of *three ri* from land at any place, such being the distance to which a cannon ball can be thrown. Men-of-war or merchant vessels will, however, be allowed free passage as heretofore.

1870, September 20.—*Proclamation of neutrality.*¹

ARTICLE 1. The belligerent parties shall not engage in hostilities in Japanese ports, inland waters, or at a distance of less than *three ri* from any part of the coast whatsoever, such being the *range of the cannons*. War-ships and merchant vessels, however, shall enjoy free passage as previously.

1904, May 26.—*Decision of the Sasebo Prize Court in the case of the Michael.*²

. . . Further, the place of capture was five and one-half nautical miles from the Korean coast, and since the international law regards territorial waters as not extending beyond *three nautical miles* from the shore, the vessel's capture took place on the high seas.

1904, May 26.—*Decision of the Sasebo Prize Court in the case of the Rossia.*³

(2) The limit of territorial waters generally recognized by existing international law is *three nautical miles* from the coast. Therefore the capture of this vessel at sea, six nautical miles from Kushingam, Corea, was a capture on the high seas, and in no way unlawful.

MEXICO

1848, February 2.—*Treaty with the United States establishing a boundary line commencing three leagues from the land.*⁴

1853, December 30.—*Treaty with the United States, establishing a boundary line three leagues from the land.*⁵

¹ Translation. For the French text, see *Revue de droit international et de législation comparée*, 2d series, vol. 3, p. 259.

² C. J. B. Hurst and F. E. Bray, *Russian and Japanese Prize Cases*, vol. 2, p. 82.

³ *Ibid.*, p. 41.

⁴ See *post*, p. 649.

⁵ See *post*, p. 650.

1882, December 5.—*Treaty of friendship, commerce, and navigation with Germany, establishing three marine leagues as the limit of marine jurisdiction.*¹

1885, July 29.—*Treaty with Sweden and Norway.*²

ARTICLE 7. The two contracting parties agree to consider as boundaries of the territorial waters of their respective coasts for all customs purposes and as measures to prevent smuggling, a distance of *three marine leagues*, measured from low-water mark.

1886, November 27.—*Treaty with France of amity, commerce and navigation, establishing a distance of twenty kilometers from the line of lowest tide as the limit of territorial sovereignty.*³

1888, November 27.—*Treaty of commerce and navigation with Great Britain establishing the distance of three marine leagues reckoned from the low-water mark as the limit of territorial waters.*⁴

1893, April 24.—*Treaty of friendship, commerce and navigation with Salvador.*⁵

XXI. It is agreed between the high contracting parties that the limit of sovereignty in the territorial waters adjacent to their respective coasts comprises a distance of *twenty kilometers* counted from the line of lowest tide; but this rule shall apply only as regards the exercise of the right of police for the execution of customs ordinances and the prevention of smuggling, and in respect of matters concerning the security of the country. In no case shall such limit be applicable to other questions of international maritime law.

1899, December 14.—*Treaty of friendship, commerce and navigation with China.*⁶

XI. . . The two contracting parties agree upon considering a distance of *three marine leagues*, measured from the line of low tide, as the limit of their territorial waters for everything relating to the vigilance and enforcement of the custom-house regulations and the necessary measures for the prevention of smuggling.

¹ See ante, p. 532.

² Translation. For the French text, see Martens, *Nouveau recueil général de traités*, 2d series, vol. 13, p. 684. August 20, 1886, is the date given by Fulton, *The Sovereignty of the Sea*, p. 679.

³ See ante, p. 526.

⁴ See ante, p. 576.

⁵ *British and Foreign State Papers*, vol. 95, p. 1362.

⁶ *Ibid.*, vol. 92, p. 1061.

NETHERLANDS

1610, May 6.—*Reasons used by the Netherland delegates visiting England for the continuance of fishing contrary to the proclamation made in May, 1609, forbidding strangers to fish.*¹

2. For that it is by the law of nations, no prince can challenge further into the sea than he can command with a cannon except gulfs within their land from one point to another.

1671, January 3.—*Regulations enjoining Netherland ships to salute foreign fortresses and towns at the distance of cannon range.*²

1691, December 8/18.—*Treaty with Great Britain and Denmark and Norway forbidding captures within sight of the dominions of the Dano-Norwegian King.*³

1824.—*Royal decree prohibiting Dutch fishermen from fishing within two leagues of the main coast of Scotland.*⁴

It shall not be permitted any Dutch fishermen to carry on herring, or pickle-herring fishery at a distance from the territorial coast of Scotland of less than *two leagues* latitude (twenty such leagues constituting one degree), nor under any pretext whatever (excepting, however, the case of urgent necessity, as provided by Article 22 of afore-mentioned law), while he is engaged in catching pickle-herring, to approach the said coast at a lesser distance.

1895, November 5.—*Unofficial letter from G. de Weckherlin, Netherland Minister to the United States, to Mr. Olney, Secretary of State of the United States, suggesting that six miles be set as the limit of the territorial sea.*⁵

As you are doubtless not unaware, the Institute of International Law discussed in March, 1894, the desirability of an understanding among the maritime nations to the end of settling by common accord the question of the limits of the territorial seas.

Conformably to the views which were developed on that occasion in the aforesaid meeting of the jurisconsults of different nationalities, the Netherland Government asks itself whether the time may not have come for the principal Powers interested to conclude a treaty to the end in question.

¹ Thomas W. Fulton, *The Sovereignty of the Sea*, p. 156; Great Britain, *State Papers, Domestic*, vol. 47, p. 111.

² See Ræstad, *La mer territoriale*, p. 114

³ See *ante*, p. 518.

⁴ Fulton, *ibid.*, p. 605, note 2.

⁵ MS., Department of State.

I accordingly take the liberty of addressing myself to your habitual courtesy in order to learn, if possible, what the President's Government would think of the idea which I have suggested.

I permit myself to add that the Minister of Foreign Affairs of the Kingdom is now disposed to believe that such a treaty should stipulate that the territorial waters should henceforth extend to a distance of *six miles* (sixty to the degree), starting from the low-water mark, while the treaty might perhaps prescribe, at the same time, that this *six miles* shall be also that of the neutral zone.

1897; February 13/25.—Award of the arbitrator in the case of the "*Costa Rica Packet*" arbitration with Great Britain, in which cannon range was established as the limit of the territorial sea.¹

1904, February 12.—Proclamation of neutrality in the Russo-Japanese war.²

ARTICLE 8. Under the territory of the Kingdom is also included the seacoast to within a distance of *3 nautical miles* of 60 degrees latitude at low-water mark. In regard to bays, that distance of *3 nautical miles* shall be measured from a straight line athwart the bay as close as possible to the entrance at the first point at which the entrance to the bay exceeds 10 miles of 60 degrees latitude.

1914, August 5.—Declaration of neutrality in the war between Belgium and Germany, and between Great Britain and Germany.³

ARTICLE 17. The State territory comprises the coastal waters to a distance of *three nautical miles*, reckoning sixty to the degree of latitude, from low-water mark.

As regards inlets, this distance of *three nautical miles* is measured from a straight line drawn across the inlet at the point nearest the entrance where the mouth of the inlet is not wider than ten nautical miles, reckoning sixty to the degree of latitude.

NORWAY⁴

1691, June 20.—Rescript to the prefects of Norway.⁵

Prizes captured . . . *within sight of the coasts* of Norway by men-of-war or merchantmen belonging to any of the belligerents shall be brought to port to be judged.

¹ See *ante*, p. 582.

² *Foreign Relations of the United States*, 1904, p. 27.

³ *The (London) Times Documentary History of the War*, vol. 2, p. 52.

⁴ See also Denmark and Norway; Sweden and Norway. *Ante*, p. 517; *post*, p. 629.

⁵ Translation. For the Norwegian text, see Arnold Ræstad, *Kongens strømme*, p. 247.

1692, December 3.—*Royal concession for whale fishing.*¹

ARTICLE 3. All foreigners and unprivileged persons shall be forbidden to hunt whales in or outside the fjords, or in the surrounding waters within a distance of *ten leagues*² from the land, on pain of confiscation of ship and property. . . .

1698, January 11.—*Renewal of the concession of December 3, 1692, for whale fishing, in which all foreigners and unprivileged persons were forbidden to hunt whales within a distance of ten leagues from the land.*³

1738, February 22.—*Consular declaration establishing a protective zone along the coasts of Greenland.*⁴

All foreign vessels which come within a distance of *four leagues* of the coasts of our colonies or land within a distance of *thirteen leagues* of the colonies (of Greenland) shall be attacked.

1745, June 18.—*Rescript fixing four miles as the extent of the national fishing monopoly.*⁵

1745, June 18.—*Royal decree on maritime prizes.*⁶

No foreign privateers shall be permitted to capture any vessel within a distance of *one league*, of fifteen to a degree of latitude, from the Norwegian coasts or its outlying banks and rocks.

1747, February 10.—*Rescript prohibiting Russian fishermen to fish within a distance of one Norwegian league off the coast of Finmarken.*⁷

Russian fishermen are hereby permitted to fish off the coasts of Finmarken . . . providing they remain at a distance of *one league* (*mil*) from the land.

¹ Translation. For the Norwegian text, see Arnold Ræstad, *Kongens strømme*, p. 242.

² Ten Norwegian leagues at this time was forty geographical miles.

³ Ræstad, *ibid.*, p. 242. See *supra* for the original concession.

⁴ Translation. For the Norwegian text, see Ræstad, *ibid.*, p. 238.

⁵ See de Lapradelle in the *Revue générale de droit international public*, vol. 5, p. 340; *ante*, p. 230.

⁶ Translation. For the Norwegian text, see J. A. S. Schmidt, *Rescripter, resolutioner og collegial-brève for kongeriget Norge for tidsrummet 1660–1813*, vol. 1, p. 315.

⁷ Translation. For the Norwegian text, see *ibid.*, 1660–1813, vol. 1, p. 335.

1759, April 20.—*Rescript to the civil governors in Norway, regarding their conduct and that of the inferior judges when the skipper of a vessel captured by a privateer asserts that the capture was made within the distance of one league from the land.*¹

On occasion of the present war between France and Great Britain, by the rescript of May 7, 1756,² it has been known that no ship shall be captured within *one league* of the Norwegian coasts, and hereby is further made known, as by rescript of February 23, 1759,³ that the said league shall be interpreted as an ordinary marine league . . .

1779, November 10.—*Rescript concerning prizes.*⁴

No privateer belonging to any of the belligerents shall capture prizes within the distance of *one league* of the Norwegian coasts.

All previous rescripts dealing with this matter shall hereby be considered repealed and without force, with the exception of the rescripts of February 23⁵ and April 20, 1759,⁶ which state that the league defined as the neutral zone of the coasts, is to be interpreted as the ordinary league of fifteen to a degree.

1812, February 22.—*Resolution establishing the marine league as measured from the outermost island or islets which are not submersed by the sea.*⁷

We will most graciously to establish as a rule in all instances where there is question as to the limit of our territorial sea, that it shall extend to a distance of *one marine league* from the outermost islands or islets which are not submersed by the sea.

1830, September 13.—*Law regarding the fisheries at Finmarken.*⁸

ARTICLE 40. If the Russians wish to maintain a place of resort in order to facilitate the fishery they are permitted at a distance of *one league* from the coast, they may do so at Kiberg, Havningsberg and Baardsfjorden in the Vardø district, and Berlevaag, Ganvig, and Steensvig in Thanens district, on the following conditions: (a) they shall be permitted to obtain bait with a hand line even nearer the shore than the said league . . .

¹ Translation. For the Norwegian text, see J. A. S. Schmidt, *Rescripter, resolutioner og collegial-breve for kongeriget Norge for tidsrummet 1660–1813*, vol. 1, p. 459.

² See ante, p. 518, and note 4.

³ No extent of the marginal sea mentioned in this rescript. See ante, p. 518, note 4.

⁴ Translation. For the Norwegian text, see J. A. S. Schmidt, *Rescripter, resolutioner og collegial-breve for kongeriget Norge for tidsrummet 1660–1813*, vol. 1, p. 602.

⁵ See supra.

⁶ Translation. For the Norwegian text, see J. Chr. Berg, *Historisk underretning om landrænet*, pp. 227, 337.

⁷ Translation. For the Norwegian text, see Axel Boeck, *Overblik over litteratur, love, forordninger, m. m. angaaende de norske fiskerier. Bilag*, p. 27.

1868, November 7.—Letter from the Minister of Foreign Affairs to the French Minister in Stockholm.¹

It is prohibited to foreign subjects to fish in the gulf, and this interdiction applies also to the littoral sea . . . to a distance of *one marine league* from the point farthest south in the Røst Islands.

1869, October 16.—Decree establishing one geographical mile as the width of the coastal zone.²

A straight line drawn at a distance of *one geographical mile* (of fifteen to a degree) from and parallel to a straight line drawn between Storholmen and Svinö, shall be taken as the boundary of the waters off the coast of Söndmøre district, in which the fishing is entirely reserved for the inhabitants of the country.

1870, January 28.—Letter from the Minister of the Interior to the Minister of Foreign Affairs.³

The letter from the Minister of the Interior to the Minister of Foreign Affairs, regarding the basis established by the preceding article,³ that is to say, the distance between Storholmen and Svinö, which is more than eight short marine leagues. The Minister maintained that, according to the law of nations, it is not necessary that the line in question follow all the sinuosities of the coast, but in the matter of bays or gulfs which are not of too large an extent, it ought to be determined by a line drawn from one advanced point to another; in like case, local circumstances ought to be taken into consideration and conditions which are natural, convenient, and just in each particular case.

1881, January 5.—Proclamation containing the regulations relative to the protection of whales on the coast of Finmarken.⁴

Referring to the law of June 19th, 1880, relative to the protection of whales on the coast of Finmarken, it is hereby ordered:

In the sea on the coast of Finmarken, at a distance not exceeding *one geographical mile* from the coast, counted from the outermost

¹ Translation. For the French text, see *Annuaire de l'institut de droit international*, vol. 11, p. 146.

² Translation. For the Norwegian text, see Thomas W. Fulton, *The Sovereignty of the Sea*, p. 671, note 1.

³ Decree of October 16, 1869, establishing *one geographical mile* as the width of the coastal zone. See *supra*.

⁴ Fur Seal Arbitration, *Proceedings of the Tribunal of Arbitration*, 1893, vol. 2, p. 483; *Norsk lovtidende*, 1881, p. 7.

islands or rocks which are never covered by the sea, it shall, until further notice, be prohibited to kill or chase whales during the period from the first of January till the end of May.

As regards the Varangerfjord, the limit for the protected tract and towards the sea shall be a straight line drawn from Kibergnæs to the boundary, the Jakobselv, but it shall also be prohibited outside of this line, during the season of protection mentioned above, to kill or chase whales at a distance of less than *one geographical mile* from Kibergnæs.

1889, September 9.—Royal decree defining exclusive fishery boundaries for Norwegians.¹

A line drawn at a distance of *one geographical mile* from and parallel to a line from Storholmen through Skraapen (outside of Harö), Gravskjær (outside of Ona), and Kalven (the last of the Orskjærens), to the last of the Jevleholme, outside of Grip, shall be considered the boundary of the waters off the coast of the Romsdal district, in which fishing is entirely reserved for the inhabitants of the country.

1891, November 30.—Extract from a letter of the Auditor General to the Marine Department.²

On account of a letter from "The Association for the Reform and Codification of the Law of Nations," dated the 1st of July, 1891, received through the War Office, the Royal "Marine Commando" has asked for my opinion on divers questions regarding the principles of the extent on sea of the territorial waters. I therefore beg to give the following explanation:

Besides the right which a State, according to general international law, exercises over its own lakes, rivers, canals, ports, roads, fjords, bays, and sounds—apart from sounds connecting open seas—the rule has been laid down in Norway that the territorial waters legally extend to *one geographical mile*, or 7,420 metres, from the farthest island or islet not covered by the sea. In a more recent time it has been strongly contended in international law that the limit, according to the formula "*terræ potestas finitur, ubi finitur armorum vis*," shall be at a *gunshot's distance* from the coast. This limit seems, however, to be vague and dependent on the development of technical science, and therefore the rule fixing the distance from the coast of *one league*, or *three English miles*, has been adopted. But as the

¹ Translation. For the Norwegian text, see Thomas W. Fulton, *The Sovereignty of the Sea*, 671; *Norsk Rækeritidende*, 1893, vol. 12, p. 464.

² Report of the Seventeenth Conference of the International Law Association, held at Brussels, October 1st–4th, 1895, p. 304.

War Office, in its letter of the 28th ult., does not solicit an answer to the questions regarding "limits of territorial waters," I shall not further deal with these questions, supposing that the rule adopted for Norway is maintained. . . .

1892, January 12.—Letter from the Marine Department of the War Office to the Department of the Interior.¹

Referring to the dispatch from the Department of the 20th of October, 1891, on the subject of certain questions from the "Association for the Reform and Codification of the Law of Nations" regarding the rules as to the extent at sea of the territorial waters, this Department has received through the "Marine Commando" the enclosed statement from the Auditor General of the 30th of November the same year, to which the "Marine Commando" has nothing to observe or to add.² This Department also agrees to the essential part of the Auditor General's explanation. . . .

1894, January 27.—Reply of the Department of the Interior to a letter of the Marine Department dated January 12, 1892.³

By the Royal Ordinance of the 22d of February, 1812 (quoted as No. 5 in the French Extract,⁴ "the island or islet farthest from the mainland, and not covered at high tide by the sea," is defined as the starting-point for the limitation of the Norwegian territorial waters. It is not expressly said whether the distance is to be reckoned at half-tide, high water, or low water. It is assumed that the territorial limit does not necessarily follow every deviation of the coast: *vide* the Royal Ordinance of the 16th of October, 1869;⁵ the letter from the Department of the Interior of the 28th of January, 1870,⁶ and the Royal Ordinance of the 9th of September, 1889 (Nos. 8, 9, and 11 in the Extract).⁶

Out to sea, the territorial waters are considered to extend to a distance of *one Norwegian sea mile*, viz., one fifteenth of a degree taken from the above point: *vide* Royal Ordinance of the 22d of February, 1812; ⁴ *cf.* rescript of 23d of February, 1759 (No. 5, *cf.* No. 3 in the Extract).⁷

¹ *Report of the Seventeenth Conference of the International Law Association, held at Brussels, October 1st-4th, 1895, p. 300.*

² See *ante*, p. 611. The extent given is one Norwegian sea mile.

³ *Report of the Seventeenth Conference of the International Law Association, p. 300.*

⁴ See *ante*, p. 609.

⁵ See *ante*, p. 610.

⁶ See *ante*, p. 611.

⁷ No extent of the territorial sea is given in this ordinance. See *ante*, p. 518, note 4.

As to bays and fjords, see letter from the Department of the Interior of the 28th of October, 1868,¹ and "Placat" of the 5th of January, 1881 (Nos. 7 and 10 in the Extract).²

The Royal Ordinance of the 22d of February, 1812, sets forth the above-mentioned limit for all cases where the extent of the territorial waters is brought in question.

*1896, December 17.—Law concerning whaling.*³

Whaling (hunting, shooting, or killing whales) is forbidden from January 1 until May 31, in the waters along the coasts of Tromsø and Finmarken within the limit of *one geographical league* (of fifteen to a degree) from the coast, computed from the outermost islands and islets which are not overflowed by the sea. The limit in the Varangerfjord in the district of Finmarken shall be a straight line drawn from Kibergnæs to Grændse, Jacobselv, in such wise, however, that also outside of this line it shall be forbidden during the aforementioned time, to chase, shoot, or kill whales within the distance of *one geographical league* from the coast at Kibergnæs.

*1906, December 22.—Instructions to commanders of Norwegian cruisers establishing the extent of territorial waters at one marine mile.*⁴

1. Fishery in the Norwegian territorial waters is forbidden all except Norwegian subjects and the inhabitants of the kingdom.

2. The extent of the Norwegian territorial waters is established at *one ordinary marine league*. (7,529 meters) from the outermost islands and islets which are not submersed by the sea.

*1912, February 29.—Report of the Commission on the limits of territorial waters.*⁵

In the opinion of the present Commission, the terms of the letters patent admit of only one certain solution, which is that rocks which are always under water must not be taken into consideration in any case. But the words in themselves may mean "which are never

¹ No extent. *Annuaire de l'Institut de droit international*, vol. 11, p. 145.

² See *ante*, p. 610.

³ Translation. For the Norwegian text, see Thomas W. Fulton, *The Sovereignty of the Sea*, p. 674, note 1.

⁴ Translation. For the Norwegian text, see H. V. Fledler and Arthur Fedderson, *Tidsskrift for fiskeri*, 1906.

⁵ Translation. For the French text, see *Rapport du 29 février 1912 de la commission de la frontière des eaux territoriales, I, Partie générale*, pp. 46–51 (Christiania, 1912). This commission was appointed by royal decree of June 29, 1911, to study the question of the boundary of the territorial waters of Finmarken. Its members were J. H. Wollebæk, chairman, chief of division in the Ministry of Foreign Affairs, Oscar Dahl, captain in the navy, and C. V. Fleischer, inspector of fisheries.

under water," "which are not usually under water," "which are not generally under water," "which are not continually under water," "which are not under water all the time," and according to any of these and many other interpretations; they may be used in the sense of high and low tide, at ordinary times or at the time of spring tides, or in the sense of the mean sea level so as to include or exclude rocks of a totally different character from those that are under water at high tide at the time of spring tides to those which at such times are above water at low tide.

There being no indication in the wording of the text itself, the most equitable method is for the Commission to draw its own conclusions based upon the following considerations: the rescript of June 18, 1745, where the term "shoals" (*hauts-fonds*) appears alongside of the term "rocks," leads to the belief that the boundary line is to be measured from the rocks which are not continually under water, and subsequent rescripts certainly did not have in view any modification in this respect; construed in this way, the different rescripts relating to the *one league* boundary line lay the minimum of restriction upon the old claim of a more extensive boundary. If the expressions used in the letters patent, which came later, are equivocal, they must preferably be given the meaning which agrees with the old right, and the words "which are not under water" must be interpreted as excluding rocks which are always under water.

If the basis of this conclusion is considered too weak, another argument can be urged, to wit: that the letters patent leave the question of the exact starting point unsettled and merely leave it to national practice as it may have been at that time (if there were any such), or as it should be at all times. A like result will be reached if the following conception is taken into consideration: inasmuch as no definite practice has come into existence since this provision was enacted, the general rules of international law (if any exist) or international practice must in every case—whatever the original meaning of the provision—serve as a guide.

According to these last considerations, it will be permissible to start with rocks which are not continually under water, including of course those which are above water only when there are spring tides, in any event in places where other circumstances contribute to confirm this method of measurement. But then we come to the question as to what should or what can be determined rather than the question as to what is the Norwegian legislation in force.

If it is admitted that rocks which are periodically above water should be taken into account, it naturally follows that the measurements must be made from the low tide line along the coast in gen-

eral. See also the two letters from the Ministry of Foreign Affairs to the Ministry of Defense, Naval Section, and to the Ministry of Justice, dated respectively March 25 and May 26, 1908: "The boundary begins at the extreme coastline at low tide." Moreover, given the configuration of our shore line, there will not be at points where the measurements from the land are to begin any appreciable difference between the figures at high tide and those at low tide.

It may be asked whether we should take into consideration any rock at all, whatever its distance from shore and place the boundary line of our territorial waters *one league* beyond it. The letters patent lay down no restrictions, neither can an order of this nature—it does not attempt to trace the boundary line in all its details along the coast—undertake to give exact indications on this subject.

It would seem, however, to be equitable to take into account, in any event, rocks that are not more than *two geographical leagues* distant. If a circle with a *one league* radius be drawn around such a rock (the width fixed upon for the territorial sea), this circle will touch a line drawn the same distance from the coast. It may also happen—and this is indeed the case with our country—that there are certain rocks strung out from shore and so closely connected therewith that the boundary line must manifestly be placed *one league* beyond the farthest out, as the letters patent provide.

If there is an isolated rock at a greater distance than *two leagues* from land, its importance must of course be determined according to the circumstances.

If it should be necessary to lay down in principle what rocks along the coast are to be considered as "the farthest out," the method most in conformity with the terms of the letters patent of 1812—which make the boundary line pass beyond the most distant islands and islets and do not even mention the coast line of the mainland—would be to consider as Norwegian the entire area of the sea between these rocks and the shore and to extend the boundary line of the territorial waters *one league* beyond the straight lines drawn from rock to rock. If the provision of the law gives any indication, it would seem to be that its intention is to consider the islands and islets as so many connecting points of the basic lines. In this way we obviate in general the necessity of drawing the boundary line in the shape of an arc beyond the rocks (or in the shape of semicircles around them with a *one league* radius), as well as of drawing a complete circle around a particular rock which is given a parcel of territorial sea separate from the rest of the zone.

How far apart, however, should two of "the most distant" rocks be to admit of the drawing of such a connecting line, from which the boundary of the territorial waters shall be measured? Lines

should be drawn, at any rate, between rocks that are not more than *two leagues apart*; but it will be necessary to consider the particular circumstances in each instance.

We must pursue the same course when it is a question of determining the boundary line off the coast where the "skjærgaard" begins and where the coast assumes the character of a fjord at whose entrance there are rocks.

The various circumstances to be taken into consideration in each particular instance may be of a historical, an economic or a geographical nature; for example, a time-honored conception with regard to the boundary, and undisturbed possession of fisheries carried on by the population along the coast since time immemorial and necessary to its existence; the practical advantages of a line easy to ascertain on the spot; the natural boundaries of fishing banks.

The pilot law of May 26, 1899, which requires the payment of pilot fees upon entering when a vessel crosses for the first time the boundary line separating the open sea from the waters enclosed by the "skjærgaard" (§3), leaves it to the King to fix this boundary line (§4). Therefore, on February 4, 1900, a royal decree was promulgated, containing, among other things, provisions relating to the passage of this boundary all along the Norwegian coast. These provisions, even if they were enacted for a special purpose, may clearly in certain places refer to what are to be understood as waters enclosed by the "skærgaard" in the general meaning of the expression. (It is proper to remark here that as regards the fjords, when there is a continuous line of islets and rocks in front of their entrances, the provisions of the law do not, in any event, give any indication as to what are to be considered Norwegian interior waters.) The provisions are governed by the purpose for which they are promulgated; for example, in the case of the Varangerfjord the lines pass into the interior; they likewise pass into the interior all along the coast of the Bay of Loppehav in such a way, however, that a line is drawn outside of the rocks that are periodically above water, Østre Gaasene and Nordboen. At certain points along the coast the pilot boundaries also pass over submarine reefs.¹

As regards the territorial sea off the prefecture of Romsdal, with its "skjærgaard" or group of islands and islets and its fjords, we have seen above that two decrees had been promulgated, one in 1869

¹ The decree of March 16, 1910, on the rules for the prevention of collisions of vessels, etc., contains a certain number of special provisions for the "interior waters of Norway"; according to §32 of the decree, we must understand by this expression "Norwegian ports, streams, canals and lakes, as well as all waters inside the line of the 'skjærgaard' fixed by the pilot law." The preceding decrees on the same subject contained the expression "Norwegian waters inside of the skjærgaard" alongside of the words ports, etc., without any precise designation.

and the other in 1889; these may serve as an indication when it is a question of the boundary off other portions of our coast having the same character. These decrees make the basic lines pass between islands that are situated very far apart and at the very extremity of the "skjærgaard" (with the exception of certain unsubmerged rocks), and they take into consideration the special conditions of the place. In the ministerial statement which gave rise to the first of these decrees, the Department even indicates that it will issue the necessary instructions, so that the boundary line "as far as the Stordyp extends shall be considered as coinciding with the line drawn so as to follow the greatest depth of this hollow"; the Department supposes therefore that the boundary line need not in its practical application follow the geometric line at a distance of one league from the basic line, but that it may deviate somewhat therefrom where the natural conditions so require.

The importance of the precautionary measure mentioned above to avoid cutting through fishing banks was recently shown in a particular instance in the arbitration case with Sweden concerning the waters washing the Griseböer. It was a question, it is true, of dividing the boundary waters and not of drawing a line between territorial waters and the high sea; but it may be of interest to cite this case. The parties were in agreement that the passing of the line through important fishing grounds would entail serious inconveniences. This agreement of the parties contributed to causing the line to be drawn, by virtue of the judgment of October 23, 1909, between the Griseböer and the Skjöttegrunde and not cutting any other important fishing ground.

Moreover, there is not in international practice, so far as appears from international treaties or laws, any indication that we may make use of. The Norwegian "skjærgaard," which extends along the whole length of a broken coast rich in fjords, with groups of islands and islets so different in character, has not many counterparts, and the question of details in the method of measuring the boundary line of territorial waters—details such as those mentioned in this work—does not play so important a part in other countries as it does in our own.

If incidents should arise which have to be settled according to our laws in force, we shall have—as we have endeavored to demonstrate above—certain indications and principles, which could be gathered either from the interpretation of these laws or from practice and which might serve to indicate the minimum of what should be considered Norwegian territory outside of the "skjærgaard." But we could not know for certain the actual extent of this territory without express provisions for each specific place.

PORTUGAL

1787, December 9/20.—Treaty of commerce with Russia.¹

ARTICLE 24. In accordance with the same principles, the two high contracting Parties engage, reciprocally, in case that one of them should be at war against any other Power whatsoever, never to attack the vessels of his enemies save at the *range of a cannon* from the shore of his ally.

1842, July 3.—Treaty with Great Britain for the suppression of traffic in slaves, in which cannon range is considered as the extent of the marginal sea.²

1885, October 2.—Convention with Spain regulating the exercise of fishing rights on the coasts of the two countries.³

II. The boundary line within which the general right of fishing is reserved exclusively to the fishermen subject to the respective jurisdictions of the two nations is fixed at *6 miles*, reckoned from the low-water mark at neap tides.

In bays whose opening does not exceed 10 miles the *6 miles* will be reckoned from a straight line drawn from one point of the opening to the other.

The said miles are geographical miles of 60 to a degree of latitude.

III. Each of the two States will have the right to make regulations for the exercise of fishing rights on their respective seacoasts for a distance of *6 miles* therefrom, within which limit the fishermen of that nation only will be permitted to ply their trade.

The two States agree that the employment shall be prohibited of double boats, "muletas," or tackle of an injurious character within a distance of *12 miles*, each State having the right to cause the detention of persons who violate this Regulation until the case against them is drawn up, with the necessity, however, of handing them over within a period of eight days to the competent authority of the neighboring Kingdom, in order that they may be subject to the penalties prescribed by the Laws and Regulations of their own country.

VI. The fishing boats of one of the two countries must not approach any point on the coast of the other to a distance less than the *6 miles* specified in Article II, except under the following circumstances, which will be considered as of *force majeure*: . . .

¹ Martens, *Recueil de traités*, 2d ed., vol. 4, p. 328.

² See *ante*, p. 547.

³ Translation. *British and Foreign State Papers*, vol. 77, p. 1182.

1893, March 27.—*Treaty of commerce with Spain, recognizing six miles as the limit of exclusive fishery rights for the two countries.*¹

1909, October 26.—*Fisheries law of Portugal.*²

ARTICLE 1. Foreign vessels are prohibited from fishing in Portuguese territorial waters within the limit of *three nautical miles* measured from the line of extreme low water.

Sole §. As regards bays, the *three-mile* limit shall be observed in accordance with the principles of international law.

PRUSSIA³

1866, November 28.—*Decree of the Supreme Court of Prussia establishing the extent of the territorial sea at cannon range.*⁴

The bordering States have only the power to take measures in the interest of the protection of navigation and commerce along the coasts, and it is from this point of view, only, that international law has admitted the necessary extension of the territorial sea out to the range of a cannon.

RUSSIA

1787, January 6/17.—*Treaty of commerce with the Two Sicilies, establishing cannon range as the extent of territorial waters.*⁵

1787, January 11.—*Treaty with France, establishing the extent of territorial waters at cannon range.*⁶

1787, January 17.—*Treaty with Naples, fixing cannon range as the limit of the neutral zone.*⁷

1787, December 9/20.—*Treaty of commerce with Portugal establishing cannon range as the extent of the territorial sea.*⁷

¹ See post, p. 626.

² Translation. *British and Foreign State Papers*, vol. 102, p. 788.

³ See also Germany.

⁴ Translation. For the French text, see Paul Godey, *La mer côtière*, p. 11, note 1; Goltdammer, *Archives*, vol. 15, p. 77.

⁵ See ante, p. 598.

⁶ See ante, p. 521.

⁷ See ante, p. 618.

1787, December 31.—*Regulations on privateering.*¹

ARTICLE 2. Russian ship-owners shall pursue, attack, take or destroy wherever there shall be an opportunity to do so, the men-of-war and merchant ships of the enemy, except when the hostile ship, in looking for shelter, shall place itself within the *range of cannon* of a harbor or the shores of a neutral Power. They shall not indulge in any act of hostility in the harbors and roadsteads belonging to neutral Powers until the enemy is beyond *cannon range*.

1801, March 13.—*Treaty with Sweden establishing cannon range as the extent of the neutral zone.*²

ARTICLE XXV. In consequence of these principles, the high contracting parties agree reciprocally, in case one of them makes war on any other Power, never to attack the vessels of its enemies within the distance of *cannon range* from the coasts of its ally; they also agree to observe the most perfect neutrality in the ports, harbors, gulfs and other waters comprised in the term closed waters, which belong to them respectively . . .

1821, September 4/16.—*Ukase establishing Russian sea boundaries at a distance of 100 Italian miles from the Asiatic and American continents.*³

§2. It is therefore prohibited to all foreign vessels not only to land on the coasts and islands belonging to Russia as stated above, but also, to approach them within less than *100 Italian miles*. The transgressor's vessel is subject to confiscation along with the whole cargo.

1869.—*Russian Prize Law.*⁴

ARTICLE 21. The right of making prizes is recognized only in the open seas. As for the open sea, it consists of waters which are not under fire of neutral batteries, or *three sea miles* from the neutral shores.

¹ Translation. For the French text, see Antoine Nuger, *Des droits de l'État sur la mer territoriale*, p. 180, note.

² Translation. For the French text, see Martens, *Recueil de traités*, 2d ed., vol. 7, p. 329.

³ *Proceedings of the Alaskan Boundaries Tribunal* (U. S. Senate Document, No. 162, 58th Cong., 2d sess.), 1904, vol. 1, pt. 2, pp. 9, 10.

⁴ *Foreign Relations of the United States*, 1887, p. 957.

1893.—*Russian instructions to cruisers.*¹

The Russian territorial waters are as follows: all the gulfs, bays and roads of the Russian coast of the Arctic Ocean, the whole expanse of the White Sea (Béloié Morie) south of the line running from Sviatoi-Noss to Kanine-Noss *three miles* from each of these two points, and finally the waters of the Arctic Ocean and of the Sea of Kara comprised in a radius of *three marine or Italian miles* from the extreme coast line at low tide or from the farthest islands, rocks, stone banks or reefs which project above the level of the water. In the gulfs formed by the peninsula Rybatchy the territorial waters are bounded by lines traced between the mouth of the frontier river of Variama and Cape Niemetsky and between Cape Zelenisky and that of Tysp-Navolok and *three miles* from said points.

1893, February 12/24.—*Rules for seal fisheries.*²

To that end, after a thorough examination, the Imperial Government has deemed it necessary to promulgate the following regulations which will be applicable for the year 1893:

I. Seal fishing will be prohibited to all ships not provided with special permission to a distance of *ten miles* along the entire length of the seacoast of Russia.

II. The prohibited area will be *thirty miles* around the Komandorsky Islands and the Island of Tulénaw (Robben Island) according to the official Russian maps, which confines the ships engaged in seal fishing to the strait between the Komandorsky Islands.

1893, May 10, 22, 30.—*Agreement with Great Britain relative to seal fisheries establishing a protective zone of ten marine miles following the sinuosities of the Russian coasts at Bering Sea, and thirty marine miles round the Komandorsky Islands, and round Tulénaw (Robben Island).*³

1894, May 4.—*Agreement with the United States for a modus vivendi in relation to the fur-seal fisheries in Bering Sea.*⁴

ARTICLE 1. The Government of the United States will prohibit citizens of the United States from hunting fur seal within a zone of *ten nautical miles* along the Russian coasts of Bering Sea and the

¹ Translation. For the French text, see *Revue générale de droit international public*, vol. 1, p. 440.

² Translation. For the French text, see *British and Foreign State Papers*, vol. 86, p. 219.

³ See *ante*, p. 578.

⁴ *British and Foreign State Papers*, vol. 86, p. 272.

North Pacific Ocean, as well as within a zone of *thirty nautical miles* around the Komandorsky (Commander) Islands and Tulénw (Robben) Island, and will promptly use its best efforts to insure the observance of this prohibition by the citizens and vessels of the United States.

SALVADOR

1893, April 24.—*Treaty of friendship, commerce and navigation with Mexico.*¹

SPAIN

1565, October.—*Philip II, King of Spain, fixes the visual horizon as the territorial limit.*²

No one can come to our coasts, harbors, roadsteads, or rivers, or *within sight of our land* to wait for or damage the ships of our allies, under any pretext whatsoever, on pain of seizure of crew and goods.

1667, May 23.—*Treaty of commerce and alliance with Great Britain, establishing the distance of cannon range as a prohibited zone for privateers.*³

1760, December 17.—*Royal decree relating to the search of vessels and contraband.*⁴

5. I likewise order that when smaller vessels loaded with tobacco and salt are encountered along the coast at a distance of *one or two leagues*, they shall be searched under the probable suspicion of being fraudulently employed, and proceedings shall be brought against their owners, masters and sailors in accordance with the ordinances and laws of these kingdoms: and this article alone shall be observed by the subjects of the Power or Powers which have published the same ordinance in their domains.

1774, December 27.—*Treaty with France authorizing French and Spanish customs authorities to seize, up to a distance of two miles from the coast, all French and Spanish ships carrying forbidden goods.*⁵

¹ See *ante*, p. 605.

² Translation. For the French text, see Ernest Nys, *Le droit international*, vol. 1, p. 499.

³ See *ante*, p. 538.

⁴ A. Riquelme, *Apéndice al derecho internacional de España*, Madrid, 1849, vol. 2, p. 194.

⁵ See *ante*, p. 521.

1775, May 1.—*Royal order prescribing rules for repressing contraband trade.*¹

3. The revenue officers shall detain and seize all classes of small French vessels, up to vessels of 100 tons burden, which they meet, loaded in whole or in part with any contraband foodstuffs or merchandise absolutely forbidden in Spain, at a distance of *two leagues* from the seacoast, near the ports, mouths of rivers, bays, and other places along the coasts. . . .

6. The tenders and vessels charged with enforcing the customs regulations shall cooperate with those of the French and shall likewise be supported by them. When the Spanish vessels cruise along the coasts they shall detain and visit small French vessels up to 100 tons burden and at *two leagues* from the seacoast; and if they find contraband foodstuffs or merchandise whose importation is absolutely prohibited, shall proceed to their confiscation in the manner provided for.

1784, September 10.—*Treaty of peace and friendship with Tripoli.*²

ARTICLE 6. Tripolitan war-ships and cruisers cannot seize any vessel of their enemies within *ten leagues* of the coast of the dominion of Spain, and if they do so, they shall be treated as pirates.

1786, June 14.—*Treaty with Algiers, establishing extreme cannon range as a zone of neutrality.*³

ARTICLE 6. If any merchant ships of Spain should be attacked in the roadsteads of Algiers or in any other port of this kingdom *within cannon range* of the fortifications, by the enemies of Spain, these (fortifications) ought to defend and protect them; and the commander shall force said enemies to give sufficient time for the Spanish ship to depart and withdraw from the said ports and roadsteads, during which time, which shall not exceed twenty-four hours, the enemy vessels shall be detained and not be given permission to pursue the Spanish ships. The King of Spain shall observe the same rules as regards the ships of Algiers on condition that they do not take prizes from their enemies *within cannon range* of any of the Spanish coasts; if these are sailing vessels and not within sight of the coasts, if they are anchored, then the moored ship must be considered as under the protection of the coast.

¹ A. Riquelme, *Apéndice al derecho internacional de España*, vol. 2, pp. 197–198.

² Translation. For the French text, see Martens, *Recueil de traités*, 2d ed., vol. 3, p. 763.

³ Translation. For the French text, see Martens, *ibid.*, vol. 4, p. 128.

1790, October 28.—*Convention with Great Britain relative to America, forbidding British subjects to carry on fisheries within the distance of ten sea leagues from the coasts occupied by Spain.*¹

1797, June 14.—*Regulations to be observed in prize cases.*²

1. The immunity of the coasts of all my dominions is not to be marked as hitherto by the doubtful and uncertain range of cannon, but by the distance of *two miles of 950 toises each*.

1799, March 1.—*Treaty with Morocco, establishing a zone of neutrality at cannon range.*³

ARTICLE 21. The vessels of the two nations, war as well as merchant vessels, which might be attacked by the vessels of a Power at war with one of them in the ports or *within cannon range* of the coast fortifications, shall be defended by the fire of the said ports or fortifications, who must detain the enemy ships and forbid them to commit any act of hostility or leave port until twenty-four hours after the friendly ship has set sail. The two high contracting Parties agree also to reclaim reciprocally from the enemy Power of the one or the other the restitution of all prizes made within a distance of *two leagues* of their coasts, or *within sight of them*, if the ships had not approached the coasts and anchored there.

1801, June 20.—*Ordinance relating to privateering.*⁴

35. I forbid the privateers to attack, commit hostilities of any kind against, or capture enemy vessels which are met with in the ports of my allied princes or States or of neutrals, as well as those which are within *cannon range* of their fortifications; declaring, in order to remove all doubt, that the jurisdiction of the cannon range is to be understood even when there are no batteries in the place where the seizure is made, provided the distance is the same, and the enemies likewise respect the immunity of the territory of the neutral and allied Powers.

1852, June 20.—*Royal decree putting into execution with various modifications the project of law on jurisdiction of the treasury and suppression of contraband trade and fraud, which was approved by the Senate.*⁵

¹ See *ante*, p. 540.

² A. Riquelme; *Apéndice al derecho internacional de España*, vol. 2, p. 252.

³ Translation. For the French text, see Martens, *Recueil de traités*, 2d ed., vol. 6, p. 599.

⁴ A. Riquelme, *ibid.*, p. 244.

⁵ Translation. For the Spanish text, see *Colección legislativa de España*, vol. 46, p. 194.

ARTICLE 18. One becomes liable to punishment for engaging in contraband trade:

10. By entering with a national or foreign vessel of less tonnage than that permitted by the regulations and instructions, loaded with prohibited or foreign merchandise, into an unauthorized port of entry, or bay, creek, or gulf of the Spanish coasts, or by sailing along these places within a designated zone of *two leagues*, that is to say *six miles*, even when the cargo is consigned to a foreign port, except in case of forced entrance owing to stress of weather, persecution of enemies or pirates, or to damage which unfits the vessel for continuing its voyage.

1878, July 14.—*Provisional convention to restore reciprocity in the exercise of the right of fishing.*¹

1. The Spanish and Portuguese people shall exercise indiscriminately the right of fishing along the maritime coasts and in the boundary rivers of Spain and Portugal, subject to the existing police laws, regulations, and provisions concerning fishing, or to the practices established in regard thereto in each locality, which are not contrary to any decision of the respective Governments.

Methods of fishing known as *almadrabas*, *almadrabillas*, and any others whatsoever which by their nature cannot be established without special authorization, are excepted from this reciprocity. The exploitation of oyster beds which exist or may exist along the coasts, in the ports and rivers of both countries are likewise excluded from reciprocity.

The arts of trawling, known as *bou* or *parejas*, *chalat*, or any other of equally pernicious effect, are subject in the seas of Portugal to the same restrictions as those imposed by the legislation of Spain and shall not be practiced at a distance of less than *twelve miles* from the coast. In the same manner will it be unlawful for Portuguese fishermen to trawl or make use of *muletas* in the seas of Spain at less than the expressed distance from the coast.

1885, October 2.—*Convention with Portugal regulating the exercise of fishing rights on the coasts of the two countries and establishing territorial limit of six miles.*²

¹ Translation. For Spanish text, see Marques de Ollivart, *Colección de los tratados, convenios y documentos internacionales*, vol. 7, p. 387.

² See *ante*, p. 618.

1893, March 27.—*Treaty of commerce and navigation with Portugal*.¹

XIX. The coast and fishery police service in both countries will be subject to the provisions contained in the regulations (Appendix No. 6 to this treaty).

XX. Either of the two high contracting parties will be at liberty to levy on the merchant vessels of the other power and on the respective cargoes any dues, as they may seem expedient, for any harbor works or customs services. In no case, however, will the dues payable by the ships of either country in the ports of the other be higher than those paid by the national vessels.

APPENDIX No. 6.²

Regulations for the Police Service of the Coast and Fisheries.

ARTICLE 1. The following provisions will regulate the police service of the coasts and fisheries in the jurisdictional waters of Portugal and Spain:

2. The limit within which the general right of fishery is exclusively reserved in favor of fishermen, subject to the respective jurisdictions of the two countries, is fixed at *six miles*, reckoned from outside the low-water line of the lowest tides.

As regards bays the aperture of which is not more than ten miles, the six miles may be reckoned from a straight line drawn from one point to the other.

The miles referred to are geographical miles, sixty to a degree of latitude.

3. Either of the two States will have the right to regulate the fisheries on its maritime coasts respectively within the distance of *six miles* from the same, within which limit native fishermen will alone be allowed to fish.

The two States agree that the use of "*parejas*," "*muletas*," or of other apparatus of a harmful effect shall be prohibited within the distance of *twelve miles*, and either State will be at liberty to detain any offenders until the judicial record of the act shall have been drawn up; such offenders must, however, be delivered up within the term of eight days to the proper authority of the neighboring country, in order that they may be subjected to the penalties imposed by the laws and regulations of their own country.

¹ *British and Foreign State Papers*, vol. 85, p. 420.

² *Ibid.*, p. 455.

SWEDEN¹

1788, July 8.—*Regulations concerning prizes.*²

ARTICLE I, section 1. Battleships, corsairs, or merchantmen, trading vessels and other vessels of all sorts belonging to the enemy may be captured in their own roadsteads, in the open sea, and along other coasts, except within the distance of *one marine league* from any neutral land, or *one-fifteenth of a degree* from the nearest inhabited coast, whether it be an island or the mainland, still less from neutral strongholds or neutral harbors.

1801, March 13.—*Treaty with Russia establishing cannon range as the extent of the neutral zone.*³

1808, April 12.—*Prize regulation establishing the marine league as the neutral zone.*⁴

ARTICLE 1, section 1. All war and merchant vessels belonging to the enemy, whether owned by the Government or by private individuals, and of whatsoever kind, whether merchant ships or corsairs, should be captured wheresoever they are encountered, however not within the distance of *one marine league* or *one-fifteenth of a degree* from any neutral coast or the nearest inhabited coast of either an island or the mainland, much less from a neutral battery or port.

1871, May 5.—*Decree adopting the limit of a mile to determine the coastal zone reserved for national fishermen.*⁵

Fishery in the waters between the Kullen Light in Scania and the Norwegian-Swedish boundary shall be reserved for Swedish subjects within the limit of *one geographical mile* from the land or from the outermost islands along the Swedish coasts, which are not constantly submerged in the sea.

1877, November 2.—*Customs statute, establishing the Swedish league as the customs zone.*⁶

ARTICLE 1 counts as territorial waters in all customs matters . . . a distance of *one Swedish league* (*one and one-half geographical league*) from the coasts or from its outermost rocks.

¹ See also Sweden and Norway, *post*, p. 629.

² Translation. For the German text, see Martens, *Recueil de traités*, 2d ed., vol. 4, p. 394.

³ See *ante*, p. 620.

⁴ Translation. For the Swedish text, see Richard Kleen, *Neutralitetens lagar*, vol. 2, p. 865.

⁵ Translation. For the Swedish text, see Arnold Ræstad, *Kongens strømme*, p. 358; *Svensk Fiskeri tidskrift*, *bilaga til hafsfiskekomiténs betänkande*, p. 82.

⁶ Translation. For the French text, see *Territorial Waters*, extracted from the 15th annual report of the Association for the Reform and Codification of the Law of Nations (International Law Association), p. 18.

1899, July 14.—*Treaty with Denmark defining the limits of the territorial sea for the exclusive fishery of the subjects of each country as one geographical league.*¹

1899, November 10.—*Proclamation establishing a reserve zone of one league for national fishermen.*²

ARTICLE 1. In the territorial waters of the kingdoms of Sweden and Denmark, the extent wherein fishery is reserved exclusively for the subjects of the respective countries shall be *one geographical league* (1/15 degree of latitude) from the coast or from the outlying islets and rocks which are not constantly submersed by the sea.

1904, July 1.—*Regulations establishing a customs zone of one league.*³

CHAPTER 1, ARTICLE 1. The Swedish waters are supposed to extend *one geographical league* (4 minutes or 7,420 meters) from the coast of the outermost islets and rocks which are not continually submerged in the sea.

1916, July 19.—*Royal decree, comprising additions to the Royal decree of December 20, 1912, with certain regulations with respect to the neutrality of Sweden during war between foreign Powers.*⁴

WE, Gustaf, etc.

Submarines belonging to foreign Powers and equipped for use in warfare may not navigate or lie in Swedish territorial waters within *3 nautical minutes* (5,556 metres) from land or from extreme outlying skerries, which are not continuously washed over by the sea, under peril of being attacked by armed force without previous warning; exception is, however, made for the passage through Oresund between parallels of latitude drawn, in the north, through Viking Light (latitude north 56° 8' 7''), and in the south, through Klagshamn Light (latitude north 55° 31' 2'').

In the event of a submarine's being compelled through bad weather or shipwreck to enter the forbidden area, the above regulation is not applicable; always provided that the vessel, while within the mentioned area, shall remain above the surface and fly its national flag as well as the international signal indicating the cause of its presence. The vessel shall leave the area as soon as possible after the reason for its presence there has ceased to exist.

This decree shall come into force on the 28th July, 1916.

GUSTAF.

¹ See *ante*, p. 516.

² Translation. For the Swedish text, see *Svensk Fiskeritidende*, 8de Årgång, p. 95.

³ Translation. For the French text, see *Rapport du février 1912 de la Commission de la frontière des eaux territoriales*, I, Partie Générale, p. 44.

⁴ Translation. *British Parliamentary Papers, Miscellaneous*, No. 8, 1917.

SWEDEN AND NORWAY¹

1885, July 29.—*Treaty with Mexico establishing a distance of three marine leagues as boundaries for all territorial waters.*²

TURKEY

1740, April 7.—*Treaty of peace with the King of the Two Sicilies.*³

ARTICLE 16. We, on our part, will not permit the vessels of the Ottoman Empire to be pursued or molested *within sight of the coasts* of our States. Likewise, the vessels of the Ottoman Empire may not molest the vessels of our friends *within sight of our coasts*.

1893, April 10.—*Notice by the Governor General of Crete, respecting the coast fishery.*⁴

According to the dispositions of the general fishery law, fishing by steam and sailing boats with nets dragged on the bottom of the sea is to be exercised beyond *three miles* from the coast; moreover, such a mode of fishing is generally and strictly prohibited within a shorter distance from the seashore.

Whereas it is ascertained that fishing is carried on along the coasts of Crete in contravention of this law, the Governor General notifies that from the 15/27th April of the current financial year 1893 (1309) fishing by steamer and large and small sailing boats using drag-nets is strictly prohibited within *three miles* from the seashore; that the boats, tackle, and nets of the contraveners of this prohibition will be confiscated; and on a second contravention, to the same penalty will be added a fine of from fifty to one hundred liras in conformity with Article 29 of the above-mentioned law, and that the aforesaid prohibition and penalties will be applied without distinction to all native, Maltese, and Italian fishermen.

MAHMOUD, *Governor Général* ad interim.

1911.—*Turkish notification to the Powers that five miles should be considered as the extent of her territorial waters.*⁵

¹ See also Norway; Sweden. *Ante*, p. 607; *post*, p. 627.

² See *ante*, p. 605.

³ Translation. For French text, see F. A. G. Wenck, *Codex juris gentium recentissimæ*, Leipzig, 1788, vol. 1, p. 525.

⁴ Translation. *British and Foreign State Papers*, vol. 85, p. 1286.

⁵ See *ante*, pp. 415–16.

UNITED STATES.

*1782, January 8.—Extract from Report of a Committee of Congress, consisting of Mr. Lovell, Mr. Carroll, and Mr. Madison, to which had been referred certain papers relative to the fisheries and Proceedings in Congress in regard thereto on 22nd January and 20th August, 1782.*¹

Another claim is the common right of the United States to take fish in the North American seas, and particularly on the banks of Newfoundland. With respect to this object, the said ministers are instructed to consider and contend for it, as described in the instructions relative to a treaty of commerce, given to John Adams on the twenty-ninth of September, 1779, as equally desired and expected by Congress with any of the other claims not made ultimata in the instructions given to the ministers plenipotentiary for negotiating a peace of the — day of — last, and are therein referred to as objects of the desires and expectations of Congress. They are also instructed to observe to his most christian majesty with respect to this claim, that it does not extend to any parts of the sea lying within *three leagues* of the shores held by Great Britain or any other nation. That under this limitation it is conceived by Congress, a common right of taking fish can not be denied to them without a manifest violation of the freedom of the seas, as established by the law of nations, and the dictates of reason; according to both which the use of the sea, except such parts thereof as lie in the vicinity of the shore, and are deemed appurtenant thereto, is common to all nations, those only excepted who have either by positive convention, or by long and silent acquiescence under exclusion, renounced that common right; and neither of these exceptions militate against the claim of the United States, since it does not extend to the vicinity of the shore, and since they are so far from having either expressly or tacitly renounced their right, that they were prior to the war, though indeed not in the character of an independent nation, in the constant, and even during the war, in the occasional exercise of it; that although a greater space than *three leagues* has in some instances been both by public treaties and by custom, annexed to the shore as part of the same dominion, yet, as it is the present aim of the maritime powers to circumscribe, so far as reason will justify, all exclusive pretensions to the sea, and as that is the distance specified in a treaty to which both Great Britain and his majesty are parties, and which relates to the very object in question, it was supposed that no other distance could, in the present case, be more properly assumed; that if a greater or an in-

¹ *North Atlantic Coast Fisheries Arbitration* (U. S. Sen. Doc. No. 870, 61st Cong., 3d sess.), vol. 7, p. 46.

definite distance should be alleged to be appurtenant by the law of nations to the shore, it may be answered, that the fisheries in question, even those on the banks of Newfoundland, being of so vast an extent, might with much greater reason be deemed appurtenant to the whole continent of North America than to the inconsiderable portion of it held by Great Britain; that Congress expect, with greater assurance, the concurrence of his majesty in these ideas, since his own claim to the fisheries would, by a contrary doctrine, be suspended on the mere concession of Great Britain, instead of resting on the solid and honourable basis of the law of nations, and of right; that if Great Britain can not, by virtue of her occupancy of the shore, claim an exclusive use of the fisheries beyond the vicinity thereof, and a right to the common use is incident to the United States as a free and independent community, they can not admit that they have no such right, without renouncing an attribute of that sovereignty which they are bound, as well as respect for his majesty's honour as for their own interests and dignity, to maintain entire; that this right is no less indispensable in its exercise than it is indisputable in its principles, the inhabitants of a considerable part of the United States being dependent thereon, both for a material proportion of their subsistence, and for the means of their commerce; and as they were in full enjoyment of this resource prior to the revolution, the loss of it by an event from which very different expectations have been cherished, and which ought to bestow as far as possible equal advantages on all who have laboured equally for its accomplishment, could not fail to be attended with disappointment and mortifying comparisons; that from these considerations Congress have the most earnest desire, as well as the most sanguine hope, that his majesty's efforts will obtain for his allies a stipulation on the part of Great Britain, not to molest them in the common use of the fisheries as above stated; or, if insuperable difficulties should oppose a positive stipulation in their favour, that his majesty will in every event find means to avoid a surrender of that common right; that whilst, however, this latter expedient is suggested to his majesty, it can not escape his discernment that it is so pregnant with dangerous consequences, that the former can not be contended for with too much urgency and zeal.

1783, September 3.—Definitive treaty of peace with Great Britain.¹

ARTICLE II. And that all disputes which might arise in the future, on the subject of the boundaries of the said United States may be prevented, it is hereby agreed and declared, that the following are,

¹ William M. Malloy, *Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and Other Powers*, vol. 1, pp. 587, 588.

and shall be, their boundaries, viz, . . . comprehending all islands within *twenty leagues* of any part of the shores of the United States, and lying between the lines to be drawn due east from the points where the aforesaid boundaries between Nova Scotia on the one part, and East Florida on the other; shall respectively touch the Bay of Fundy and the Atlantic Ocean; excepting such islands as now are, or heretofore have been, within the limits of the said province of Nova Scotia.

1787, January.—*Treaty of peace and friendship with Morocco.*¹

ADDITIONAL ARTICLE. . . . That if any vessel belonging to the United States shall be in any of the ports of His Majesty's dominions, or *within gun shot* of his forts, she shall be protected as much as possible; and no vessel whatever, belonging either to Moorish or Christian Powers, with whom the United States may be at war, shall be permitted to follow or engage her, as we now deem the citizens of America our good friends.

1793, May 14.—*Attorney General Randolph on the capture of the British ship "Grange" by the French frigate "L'Embuscadé" in Delaware Bay.*²

SIR: The Attorney General of the United States has the honor of submitting to the Secretary of State his opinion concerning the seizure of the ship *Grange*.

The essential facts are—

That the river Delaware takes its rise within the limits of the United States.

That, in the whole of its descent to the Atlantic ocean, it is covered on each side by the territory of the United States.

That, from tidewater to the distance of about sixty miles from the Atlantic ocean, it is called the *river* Delaware.

That at this distance from the sea it widens, and assumes the name of the *bay* of Delaware, which it retains to the mouth.

That its mouth is formed by the Capes Henlopen and May; the former belonging to the State of Delaware, in property and jurisdiction; the latter to State of New Jersey.

That the Delaware does not lead from the sea to the dominions of any foreign nation.

¹ Malloy, vol. 1, p. 1211.

² *Official Opinions of the Attorneys General of the United States*, vol. 1, p. 33.

That, from the establishment of the British provinces on the banks of the Delaware to the American revolution, it was deemed the peculiar navigation of the British empire.

That by the treaty of Paris, on the 3d day of September, 1783, his Britannic Majesty relinquished, with the privity of France, the sovereignty of those provinces, as well as of the other provinces and colonies.

And that the *Grange* was arrested *in* the Delaware, within the *capas*, before she had reached the sea, after her departure from the port of Philadelphia.

It is a principle firm in reason, supported by the civilians, and tacitly approved in the document transmitted by the French minister, that to attack an enemy in a neutral territory is absolutely unlawful.

Hence, the inquiry is reduced to this simple form: whether the place of seizure was in the territory of the United States?

From a question originating under the foregoing circumstances, is obviously and properly excluded every consideration of a dominion over the *sea*. The solidity of our neutral right does not depend, in this case, on any of the various distances claimed on that element by different nations possessing the neighboring shore. But if it did, the field would probably be found more extensive and more favorable to our demand than is supposed by the document above referred to; for the *necessary* or *natural* law of nations (unchanged as it is, in this instance, by any compact or other obligation of the United States) will, perhaps, when combined with the treaty of Paris in 1783, justify us in attaching to our coasts an extent into the sea beyond the reach of *cannon shot*.

In like manner is excluded every consideration how far the spot of seizure was capable of being defended by the United States; for although it will not be conceded that this could not be done, yet will it rather appear that the mutual rights of the States of New Jersey and Delaware, up to the middle of the river, supersede the necessity of such an investigation. No. The corner stone of our claim is, that the United States are proprietors of the lands on both sides of the Delaware, from its head to its entrance into the sea.

The high ocean, *in general*, it is true, is unsusceptible of becoming property. It is a gift of nature, manifestly destined for the use of all mankind—inexhaustible in its benefits—not admitting metes and bounds. But rivers may be appropriated, because the reverse is their situation; were they open to all the world, they would prove the inlets of perpetual disturbance and discord; would soon be rendered barren by the number of those who would share in their products; and, moreover, they may be defined.

A river, considered merely as such, is the property of the people through whose lands it flows, or of him under whose jurisdiction that people is. Grot. b. 2, c. 2, s. 12.

Rivers might be held in property, though neither where they rise, nor where they discharge themselves, be within our territory, but they join to water above and below, or the sea. It is sufficient for us that the larger portion of water (that is, the sides) is shut up in our banks; and that the river, in respect of our land, is itself small and insignificant. Grot. b. 2, c. 3, s. 7. And Barbeyrac, in his note, subjoins, that neither of these is necessary.

Rivers may be the property of whole States. Puf. b. 3, c. 3, s. 4.

To render a thing capable of being appropriated it is not strictly necessary that we should enclose it, or be able to enclose it within artificial bounds, or such as are different from its own substance; it is sufficient if the compass and extent of it can be any way determined. And therefore Grotius hath given himself a needless trouble, when, to prove rivers capable of property, he useth the argument that although they are bounded by the land at neither end, but united to the other rivers or the sea, yet it is enough that the greater part of them—that is, their sides—are enclosed. Puf. b. 4, c. 5, s. 3.

When a nation takes possession of a country in order to settle there, it possesses everything included in it, as lands, lakes, rivers, &c. Vattel, b. 1, c. 22, s. 266.

To this list might be added Bynkershoek and Selden. But the dissertation of the former, *De Dominio Maris*, can not be quoted in detachment; and the authority of the latter on *this* head may, in the judgment of some, partake too much of affection for the hypothesis of *mare clausum*. As Selden, however, sinks in influence on this question, so must Grotius rise, who contended for the *mare liberum*; and his accurate commentator, Rutherforth, confirms the principles in the following passage: "A nation, by settling upon any tract of land which at the time of such settlement 'had no other owner, acquires, in respect of all other nations, an exclusive right of full or absolute property not only in the land, but in the waters likewise that are included within the land, such as rivers, pools, creeks, or bays. The absolute property of a nation, in what it has thus seized upon, is its right of territory." 2 Ruth. b. 2, c. 9, s. 6.

Congress, too, have acted on these ideas when, in their collection laws, they ascribe to a State the rivers wholly within that State.

It would seem, however, that the spot of seizure is attempted to be withdrawn from the protection of these respectable authorities as being in the *bay* of Delaware instead of the *river* Delaware.

Who can seriously doubt the identity of the *river* and *bay* of Delaware? How often are different portions of the same stream denomi-

nated differently? This is sometimes accidental; sometimes for no other purpose than to assist the intercourse between man and man, by easy distinctions of space. Are not this river and this bay fed by the same springs from the land, and the same tides from the ocean? Are not both doubly flanked by the territory of the United States? Have any local laws, at any time, provided variable arrangements for the river and the bay? Has not the jurisdiction of the contiguous States been exercised equally on both?

But suppose that the *river* was dried up, and the *bay* alone remained. Grotius continues the argument of the 7th section of the 3d chapter of the 2d book, above cited, in the following words:

By this instance it seems to appear that the property and dominion of the sea might belong to him who is in possession of the lands on both sides, though it be open above as a gulf, or above and below as a strait, provided it is not so great a part of the sea that, when compared with the land on both sides, it can not be supposed to be some part of them. And now what is lawful to one king or people may be also lawful to two or three, if they have a mind to take possession of the sea thus inclosed within their lands, for it is in this manner that a river which separates two nations has first been possessed by both, and then divided.

The gulfs and channels, or arms of the sea, are, according to the regular course, supposed to belong to the people with whose lands they are encompassed. Puf. b. 4, c. 5, s. 8.

Valin, in b. 5, tit. 1, p. 685, of his commentary on the marine ordinance of France, virtually acknowledges that particular seas may be appropriated. After reviewing the contest between Grotius and Selden, he says: "S'il [Selden] s'en put donc tenir là, ou plutôt, s'il eut distingué l'océan des mers particuliers, et même dans l'océan l'étendue de mer qui doit être censée appartenir aux souverains des côtes qui en sont baignées, sa victoire eut été complète."

These remarks may be enforced by asking, What nation can be injured in its rights by the Delaware being appropriated to the United States? And to what degree may not the United States be injured, on the contrary ground? It communicates with no foreign dominion; no foreign nation has ever before had a community of right in it, as if it were a main sea; under the former and present governments, the exclusive jurisdiction has been asserted. By the very first collection law of the United States, passed in 1789, the county of Cape May, which includes Cape May itself, and all the waters thereof (therefore within the jurisdiction of the State of New Jersey) are comprehended in the district of Bridgetown. The whole of the State of Delaware, reaching to Cape Henlopen, is made one district. Nay, unless these positions can be maintained, the bay of Chesapeake, which, in the same law, is so fully assumed to be within

the United States, and which, for the length of the Virginia territory, is subject to the process of several counties, to any extent, will become a rendezvous to all the world, without any possible control from the United States. Nor will the evil stop here. It will require but another short link in the process of reasoning to disappropriate the mouths of some of our most important rivers. . . .

1793, November 8.—Secretary of State Jefferson to the British Minister.¹

SIR: The President of the United States, thinking that, before it shall be finally decided to what distance from our seashores the territorial protection of the United States shall be exercised, it will be proper to enter into friendly conferences and explanations with the powers chiefly interested in the navigation of the seas on our coasts, and relying that convenient occasions may be taken for these hereafter, finds it necessary in the meantime to fix provisionally on some distance for the present government of these questions. You are sensible that very different opinions and claims have been heretofore advanced on this subject. The greatest distance to which any respectable assent among nations has been at any time given, has been the extent of the *human sight*, estimated at upwards of *20 miles*, and the smallest distance, I believe, claimed by any nation whatever is *the utmost range of a cannon ball*, usually stated at a *sea league*. Some intermediate distances have also been insisted on, and that of *three sea leagues* has some authority in its favor. The character of our coast, remarkable in considerable parts of it for admitting no vessels of size to pass near the shores, would entitle us, in reason, to as broad a margin of protected navigation as any nation whatever. Reserving, however, the ultimate extent of this for future deliberation, the President gives instructions to the officers acting under his authority to consider those heretofore given them as restrained for the present to the distance of *one sea league, or three geographical miles*, from the seashores. This distance can admit of no opposition, as it is recognized by treaties between some of the powers with whom we are connected in commerce and navigation and is as little, or less, than is claimed by any of them on their own coasts. . . .

1794, June 5.—An Act in addition to the Act for the punishment of certain crimes against the United States.²

SECTION 6. *And be it further enacted and declared*, That the district courts shall take cognizance of complaints, by whomsoever

¹ Moore, *International Law Digest*, vol. 1, p. 702. A similar note was sent on the same day to the French minister. *American State Papers, Foreign Relations*, vol. 1, p. 183.

² *U. S. Statutes at Large*, vol. 1, p. 384.

instituted, in cases of captures made within the waters of the United States or within *a marine league* of the coasts or shores thereof.

*1794, November 19.—Treaty of amity, commerce, and navigation with Great Britain.*¹

ARTICLE 25. . . . Neither of the said parties shall permit the ships or goods belonging to the subjects or citizens of the other, to be taken within *cannon shot* of the coast, nor in any of the bays, ports, or rivers of their territories, by ships of war, or others having commission from any prince, republic, or state whatever. But in case it should so happen, the party whose territorial rights shall thus have been violated, shall use his utmost endeavors to obtain from the offending party, full and ample satisfaction for the vessel or vessels so taken, whether the same be vessels of war or merchant vessels.

*1796, September 2.—Secretary of State Pickering to the Lieutenant Governor of Virginia.*²

Our jurisdiction . . . has been fixed (at least for the purpose of regulating the conduct of the government in regard to any events arising out of the present European war) to extend *three geographical miles (or nearly three and a half English miles)* from our shores; with the exception of any waters or bays which are so landlocked as to be unquestionably within the jurisdiction of the United States, be their extent what they may.

*1799, March 2.—An act to regulate the collection of duties on imposts and tonnage.*³

SECTION 25. *And be it further enacted*, That every master or other person, having the charge or command of any ship or vessel, belonging in the whole or in part to a citizen or citizens, inhabitant or inhabitants of the United States laden with goods as aforesaid, and bound to any port or place in the United States, shall, on his arrival within *four leagues* of the coast thereof, or within any of the bays, harbors, ports, rivers, creeks or inlets thereof, upon demand, produce the manifest or manifests in writing, which such master or other person is required, as aforesaid, to have on board his said ship or vessel,

¹ *U. S. Statutes at Large*, vol. 8, pp. 116, 128; Malloy, vol. 1, pp. 590, 604. This article expired October 28, 1807.

² Moore, *International Law Digest*, vol. 1, p. 704.

³ *U. S. Statutes at Large*, vol. 1, pp. 627, 646, 647, 648, 668, 700.

to such officer or officers of the customs, . . . *Provided always*, that nothing herein contained shall be construed to require of such master or other person having the charge or command of such ship or vessel the delivery of more than one copy of each manifest to the officer or officers aforesaid, who shall first come on board of such ship or vessel within *four leagues* of the coast of the United States aforesaid, and one other copy to such officer or officers as shall first come on board within the limits of any district for which the cargo of such ship or vessel, or some part thereof, shall be consigned or destined, or shall be construed to require the delivery of any such copy to any other officer, . . .

SECTION 26. *And be it further enacted*, That if the master or other person having the charge or command of any ship or vessel, laden as aforesaid, and bound to any port or place in the United States, shall not upon his arrival within *four leagues* of the coast thereof where the cargo of such ship or vessel, or any part thereof, is intended to be discharged, produce such manifest . . . , such master shall forfeit . . . a sum not exceeding five hundred dollars; . . .

SECTION 27. *And be it further enacted*, That if, after the arrival of any ship or vessel, so laden with goods as aforesaid, and bound to the United States, within the limits of any of the districts of the United States, or within *four leagues* of the coast thereof, any part of the cargo of such ship or vessel shall be unladen for any purpose whatever from out of such ship or vessel as aforesaid, before such ship or vessel shall come to the proper place for the discharge of her cargo, or some part thereof, and shall be there duly authorized by the proper officer or officers of the customs to unlade the same, the master or other person having the charge or command of such ship or vessel, and the mate, or other person next in command, shall respectively forfeit and pay the sum of one thousand dollars, for each such offence, and the goods, wares, and merchandise, so unladen and unshipped, shall be forfeited and lost, except in the case of some unavoidable accident, necessity or distress of weather; of which unavoidable accident, necessity, or distress, the master or other person having the charge or command of such ship or vessel shall give notice to, and together with two or more of the officers or mariners (of which the mate or other person next in command shall be one) on board such ship or vessel, shall make proof upon oath before the collector or other chief officer of the customs of the district within the limits of which such accident, necessity or distress shall happen, or before the collector or other chief officer of the first district of the United States, within the limits of which such ship or vessel shall afterwards arrive, if the said accident, necessity or distress shall have happened not within the limits of any district, but within *four leagues* of the

coast of the United States, which oath the said collector, or other chief officer, is hereby authorized and required to administer.

SECTION 54. *And be it further enacted*, That it shall be lawful for all collectors, naval officers, surveyors, inspectors, and the officers of the revenue cutters, hereinafter mentioned, to go on board of ships or vessels in any port of the United States, or within *four leagues* of the coasts thereof, if bound to the United States, whether in or out of their respective districts, for the purposes of demanding the manifests aforesaid, and of examining and searching the said ships or vessels. . . .

SECTION 99. *And be it further enacted*, That the officers of the said revenue cutters shall be appointed by the President of the United States, and shall respectively be deemed officers of the customs, and shall be subject to the direction of such collectors of the revenue, or other officers thereof, as from time to time shall be designated for that purpose; they shall have power and authority, and are hereby required and directed to go on board all ships or vessels, which shall arrive within the United States, or within *four leagues* of the coast thereof, if bound for the United States, and to search and examine the same, and every part thereof, and to demand, receive, and certify the manifests hereinbefore required to be on board certain ships or vessels, and to affix and put proper fastenings on the hatches and other communications with the hold of any ship or vessel, and to remain on board the said ships and vessels, until they arrive at the port or place of their destination.

1800, May 17.—*Secretary of State Madison to Messrs. Monroe and Pinckney, suggesting an article for negotiations with Great Britain.*¹

It is agreed that all armed vessels belonging to either of the parties engaged in war shall be effectually restrained by positive orders, and penal provisions, from seizing, searching, or otherwise interrupting or disturbing vessels to whomsoever belonging, whether outward or inward bound, within the harbors or the chambers formed by headlands, or anywhere at sea, within the distance of *four leagues* from the shore, or from a right line from one headland to another; it is further agreed, that, by like orders and provisions, all armed vessels shall be effectually restrained by the party to which they respectively belong, from stationing themselves, or from roving or hovering so near the entry of any of the harbors or coasts of the other, as that merchantmen shall apprehend their passage to be unsafe, or in dan-

¹ U. S. Naval War College, *International Law Topics and Discussions*, 1913, p. 36.

ger of being set upon and surprised; and that in all cases where death shall be occasioned by any proceeding contrary to these stipulations, and the offender can not conveniently be brought to trial and punishment under the laws of the party offended, he shall, on demand made within . . . months, be delivered up for that purpose.

If the distance of *four leagues* can not be obtained, any distance not less than *one sea league* may be substituted in the article. It will occur to you that the stipulation against the roving and hovering of armed ships on our coasts so as to endanger or alarm trading vessels will acquire importance as the space entitled to immunity shall be narrowed.

1804, March 5.—*Decision of the Supreme Court in the case of Church v. Hubbard.*¹

MARSHALL, CH. J., delivered the opinion of the court:

. . . The authority of a nation, within its own territory, is absolute and exclusive. The seizure of a vessel, within the *range of its cannon*, by a foreign force, is an invasion of that territory, and is a hostile act which it is its duty to repel. But its power to assure itself from injury may certainly be exercised beyond the limits of its territory. Upon this principle, the right of a belligerent to search a neutral vessel on the high seas for contraband of war, is universally admitted, because the belligerent has a right to prevent injury done to himself by the assistance intended for his enemy: so, too, a nation has a right to prohibit any commerce with its colonies. Any attempt to violate the laws made to protect this right is an injury to itself, which it may prevent, and it has a right to use the means necessary for its prevention. These means do not appear to be limited within any certain marked boundaries, which remain the same at all times and in all situations. If they are such as unnecessarily to vex and harass foreign lawful commerce, foreign nations will resist their exercise. If they are such as are reasonable and necessary to secure their laws from violation, they will be submitted to.


In different seas and on different coasts a wider or more contracted range in which to exercise the vigilance of the government will be assented to. Thus, in the channel, where a very great part of the commerce to and from all the north of Europe passes through a very narrow sea, the seizure of vessels on suspicion of attempting illicit trade must necessarily be restricted to very narrow limits; but on the coast of South America, seldom frequented by vessels but for the purpose of illicit trade, the vigilance of the government may be extended somewhat further, and foreign nations submit to such regulations as are reasonable in themselves and are really necessary to

¹ *U. S. Reports*, 2 Cranch, 187, 234.

secure that monopoly of colonial commerce which is claimed by all nations holding distant possessions.

. . . Indeed, the right given to our own revenue cutters to visit vessels *four leagues* from our coast is a declaration that, in the opinion of the American Government, no such principle as that contended for has a real existence. [The plaintiff was contending that the seizure of a ship by the Portuguese governor at Para for illicit trading was illegal because the ship was merely hovering off shore.]

1804, September 8.—President Jefferson to the Secretary of the Treasury.¹

As we shall have to lay before Congress the proceedings of the British vessels at New York, it will be necessary for us to say to them with certainty which specific aggressions were committed within the common law, which within the admiralty jurisdiction, and which on the high seas. The rule of the common law is that wherever you can see from land to land, all the waters within the line of sight is in the body of the adjacent country and within common-law jurisdiction. Thus, if in this curvature  you can see from *a* to *b*, all the water within the line of sight is within common-law jurisdiction, and a murder committed at *c* is to be tried as at common law. Our coast is generally visible, I believe, by the time you get within about 25 miles. I suppose that at New York you must be some miles out of the Hook before the opposite shores recede 25 miles from each other. The *3 miles* of maritime jurisdiction is always to be counted from this line of sight.

1805, November 30.—Statement of President Jefferson.²

The President mentioned a late act of hostility committed by a French privateer near Charleston, S. C., and said that we ought to assume as a principle that the neutrality of our territory should extend to the Gulf Stream, which was a natural boundary, and within which we ought not to suffer any hostility to be committed. M. Gailard observed that on a former occasion, in Mr. Jefferson's correspondence with Genet, and by an act of Congress at that period, we had seemed only to claim the usual distance of *three miles* from the coast; but the President replied that he had then assumed that principle because Genet by his intemperance forced us to fix on some point, and we were not then prepared to assert the claim of jurisdiction to the extent we are in reason entitled to; but he had then taken care

¹ Paul Leicester Ford, *The Writings of Thomas Jefferson*, vol. 8, p. 319.

² *Memoirs of John Quincy Adams* (Philadelphia, 1874), p. 375; Naval War College, *International Law Topics and Discussion*, 1913, p. 17.

expressly to reserve the subject for future consideration, with a view to this same doctrine for which he now contends. I observed that it might be well, before we ventured to assume a claim so broad, to wait for a time when we should have a force competent to maintain it. But in the meantime, he said, it was advisable *to squint at it*, and to accustom the nations of Europe to the idea that we should claim it in future.

1806, December 31.—*Unconfirmed treaty of amity, commerce, and navigation with Great Britain.*¹

ARTICLE 12. And whereas it is expedient to make special provisions respecting the maritime jurisdiction of the high contracting parties on the coast of their respective possessions in North America on account of peculiar circumstances belonging to those coasts, it is agreed that in all cases where one of the said high contracting parties shall be engaged in war, and the other shall be at peace, the belligerent Power shall not stop, except for the purpose hereafter mentioned, the vessels of the neutral Power, or the unarmed vessels of other nations, within *five marine miles* from the shore belonging to the said neutral Power on the American seas.

Provided, That the said stipulation shall not take effect in favour of the ships of any nation or nations which shall not have agreed to respect the limits aforesaid, as the line of maritime jurisdiction of the said neutral State. And it is further stipulated, that if either of the high contracting parties shall be at war with any nation or nations which shall not have agreed to respect the said special limit or line of maritime jurisdiction herein agreed upon, such contracting party shall have the right to stop or search any vessel beyond the limit of a *cannon shot*, or *three marine miles* from the said coast of the neutral Power, for the purpose of ascertaining the nation to which such vessel shall belong; and with respect to the ships and property of the nation or nations not having agreed to respect the aforesaid line of jurisdiction, the belligerent Power shall exercise the same rights as if this article did not exist; and the several provisions stipulated by this article shall have full force and effect only during the continuance of the present treaty.

ARTICLE 19. It shall be lawful for the ships of war and privateers belonging to the said parties, respectively, to carry whithersoever they please the ships and goods taken from their enemies without being obliged to pay any fees to the officers of the Admiralty, or to any judges whatever; nor shall the said prizes, when they arrive at and enter the ports of the said parties, be detained or seized; nor shall

¹ *North Atlantic Coast Fisheries Arbitration* (U. S. Sen. Doc. No. 870, 61st Cong., 3d sess.), vol. 4, Appendix, p. 42.

the searchers or other officers of those places visit such prizes (except for the purpose of preventing the carrying of any part of the cargo thereof on shore in any manner contrary to the established laws of revenue, navigation, or commerce); nor shall such officers take cognizance of the validity of such prizes, but they shall be at liberty to hoist sail and depart as speedily as may be, and carry their said prizes to the places mentioned in their commissions or patents, which the commanders of the said ships of war or privateers shall be obliged to show.

No shelter or refuge shall be given in their ports to such as have made a prize upon the subjects or citizens of either of the said parties; but, if forced by stress of weather or the dangers of the sea to enter them, particular care shall be taken to hasten their departure, and to cause them to retire as soon as possible. Nothing in this treaty contained shall, however, be construed to operate contrary to the former and existing public treaties with other Sovereigns or States; but the two parties agree that, while they continue in amity, neither of them will in future make any treaty that shall be inconsistent with this or the preceding article.

Neither of the said parties shall permit the ships or goods belonging to the subjects or citizens of the other to be taken within *cannon shot* of the coast, nor within the jurisdiction described in Article 12, so long as the provisions of the said article shall be in force, but ships of war or others having commissions from any Prince, Republic, or State whatever. But in case it should so happen the party whose territorial rights shall thus have been violated shall use his utmost endeavours to obtain from the offending party full and ample satisfaction for the vessel or vessels so taken, whether the same be vessels of war or merchant vessels.

1807, February 3.—*Secretary of State Madison to Messrs. Monroe and Pinckney.*¹

MARGINAL JURISDICTION ON THE HIGH SEAS.

There could surely be no pretext for allowing less than a *marine league* from the shore, that being the narrowest allowance found in any authorities on the law of nations. If any nation can fairly claim a greater extent, the United States have pleas which can not be rejected; and if any nation is more particularly bound by its own example not to contest our claim, Great Britain must be so by the extent of her own claims to jurisdiction on the seas which surround her. It is hoped, at least, that within the extent of *one league* you

¹ *American State Papers, Foreign Relations*, vol. 3, pp. 153, 155.

will be able to obtain an effectual prohibition of British ships of war from repeating the irregularities which have so much vexed our commerce and provoked the public resentment, and against which an article in your instructions emphatically provides. It can not be too earnestly pressed on the British Government, that in applying the remedy copied from regulations heretofore enforced against a violation of the neutral rights of British harbors and coasts, nothing more will be done than what is essential to the preservation of harmony between the two nations. In no case is the temptation or the facility greater to ships of war for annoying our commerce than in their hovering on our coasts and about our harbors; nor is the national sensibility in any case more justly or more highly excited than by such insults. The communications lately made to Mr. Monroe, with respect to the conduct of British commanders, even within our own waters, will strengthen the claim for such an arrangement on this subject, and for such new orders from the British Government, as will be a satisfactory security against future causes of complaint.

*1807, February 10.—An Act to provide for surveying the coasts of the United States.*¹

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President of the United States shall be, and he is hereby, authorized and requested to cause a survey to be taken of the coasts of the United States, in which shall be designated the islands and shoals, with the roads or places of anchorage, within twenty leagues of any part of the shores of the United States; and also the respective courses and distances between the principal capes, or headlands, together with such other matters as he may deem proper for completing an accurate chart of every part of the coasts within the extent aforesaid.

*1808, March 2.—Rose v. Himely.—Decision of the Supreme Court to the effect that a seizure beyond the limits of the territorial jurisdiction for a breach of a municipal regulation is not warranted by the law of nations, and that such a seizure can not give jurisdiction to the courts of the offended country, especially if the property seized is never carried within its territorial jurisdiction.*²

MARSHALL, CH. J., delivered the opinion of the court.

¹ U. S. Statutes at Large, vol. 2, p. 413.

² U. S. Reports, 4 Cranch, 241, 266, 277. See also *ibid.*, p. 292.

Will a seizure *de facto*, made without the territorial dominion of the sovereign under cover of whose authority it is made, give a court jurisdiction of a thing never brought within the dominions of that sovereign? This is a question upon which considerable difficulty has been felt, and on which some contrariety of opinion exists. . . .

It is conceded, that the legislation of every country is territorial; that beyond its own territory, it can only affect its own subjects or citizens. It is not easy to conceive a power to execute a municipal law, or to enforce obedience to that law, without the circle in which that law operates. A power to seize for the infraction of a law is derived from the sovereign, and must be exercised, it would seem, within those limits which circumscribe the sovereign power. The rights of war may be exercised on the high seas; because war is carried on upon the high seas; but the pacific rights of sovereignty must be exercised within the territory of the sovereign.

If these propositions be true, a seizure of a person not a subject, or of a vessel, not belonging to a subject, made on the high seas for the breach of a municipal regulation, is an act which the sovereign can not authorize. The person who makes this seizure, then, makes it on a pretext which, if true, will not justify the act and is a marine trespasser. To a majority of the court, it seems to follow, that such a seizure is totally invalid. . . .

1810, March 17.—*Hudson and Smith v. Guestier*. Decision of the Supreme Court to the effect that a seizure beyond the limits of the territorial jurisdiction, for breach of a municipal regulation, is warranted by the law of nations.¹

LIVINGSTON, J.:

Considering it, then, as settled, that the French tribunal had jurisdiction of property seized under a municipal regulation, within the territorial jurisdiction of the government of St. Domingo, it only remains for me to say, whether it will make any difference if, as now appears to have been the case, the vessel were taken on the high seas, or more than *two leagues* from the coast. If the *res* can be proceeded against, when not in the possession or under the control of the court, I am not able to perceive, how it can be material, whether the capture were made within or beyond the jurisdictional limits of France; or in the exercise of a belligerent or municipal right. By a seizure on the high seas, she interfered with the jurisdiction of no other nation, the authority of each being there concurrent. It would seem also,

¹ U. S. Reports, 6 Cranch, 283.

that if jurisdiction be at all permitted, where the thing is elsewhere, the court exercising it must necessarily decide, and that ultimately, or subject only to the review of a superior tribunal of its own state, whether, in the particular case, she had jurisdiction, if any objection be made to it.

1812, May term.—*Decision of Judge Story in the case of the brig "Ann."*¹

As the *Ann* arrived off Newburyport, and within *three miles* of the shore, it is clear that she was within the acknowledged jurisdiction of the United States. All the writers upon public law agree that every nation has exclusive jurisdiction to the distance of a *cannon shot*, or *marine league*, over the waters adjacent to its shores (Bynk. Qu. Pub. Juris. 61; 1 Azuni [Mar. Law], 204, Par. 15; Id., p. 185, par. 4); and this doctrine has been recognized by the supreme court of the United States. [Church v. Hubbart], 2 Cranch [6 U. S.], 187, 231. Indeed such waters are considered as a part of the territory of the sovereign.

1818, April 20.—*An act in addition to the "act for the punishment of certain crimes against the United States."*²

SECTION 7. *And be it further enacted*, That the district courts shall take cognizance of complaints, by whomsoever instituted, in cases of captures made within the waters of the United States, or within a *marine league* of the coasts or shores thereof.

1818, October 20.—*Convention with Great Britain respecting fisheries, boundary, and the restoration of slaves.*³

ARTICLE 1

Whereas differences have arisen respecting the liberty claimed by the United States for the inhabitants thereof, to take, dry, and cure fish, on certain coasts, bays, harbors, and creeks, of His Britannic Majesty's Dominions in America, it is agreed between the high contracting parties, that the inhabitants of the said United States shall have, for ever, in common with the subjects of His Britannic Majesty, the liberty to take fish of every kind on that part of the southern coast of Newfoundland which extends from Cape Ray to the Rameau Islands, on the western and northern coast of Newfoundland, from the said Cape Ray to the Quirpon Islands on the shores of the Mag-

¹ *Federal Cases*, vol. 1, p. 926; Circuit & District Courts, 1789–1880, Case No. 397.

² *U. S. Statutes at Large*, vol. 3, p. 449.

³ Malloy, vol. 1, p. 631.

dalen Islands, and also on the coasts, bays, harbors, and creeks from Mount Joly, on the southern coast of Labrador, to and through the Straits of Belle Isle, and thence northwardly indefinitely along the coast, without prejudice however, to any of the exclusive rights of the Hudson Bay Company: And that the American fishermen shall also have liberty forever, to dry and cure fish, in any of the unsettled bays, harbors, and creeks of the southern part of the coast of Newfoundland hereabove described, and of the coast of Labrador; but so soon as the same, or any portion thereof, shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such portion so settled, without previous agreement for such purpose with the inhabitants, proprietors, or possessors of the ground. And the United States hereby renounce forever, any liberty heretofore enjoyed or claimed by the inhabitants thereof, to take, dry, or cure fish on, or within *three marine miles* of any of the coasts, bays, creeks, or harbors of His Britannic Majesty's Dominions in America not included within the above-mentioned limits; Provided however, that the American fishermen shall be admitted to enter such bays or harbors for the purpose of shelter and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever. But they shall be under such restrictions as may be necessary to prevent their taking, drying or curing fish therein, or in any other manner whatever abusing the privileges hereby reserved to them.

1824, March 17.—*The case of "The Apollon." Decision of the Supreme Court to the effect that the municipal laws of one nation do not extend in their operation beyond its own territory, except as regards its own citizens, and that a seizure for the breach of the municipal laws of one nation can not be made within the territory of another.*¹

STORY, Justice, delivered the opinion of the court:

The laws of no nation can justly extend beyond its own territory, except so far as regards its own citizens. They can have no force to control the sovereignty or rights of any other nation, within its own jurisdiction. And however general and comprehensive the phrases used in our municipal laws may be, they must always be restricted in construction to places and persons, upon whom the legislature have authority and jurisdiction. . . .

. . . The arrest of an offending vessel must, therefore, be restrained to places where our jurisdiction is complete, to our own waters, or to the ocean, the common highway of all nations.

¹ *U. S. Reports*, 9 Wheaton, p. 370.

It is said, that there is a revenue jurisdiction, which is distinct from the ordinary maritime jurisdiction over waters within the *range of a cannon shot* from our shores. And the provisions in the collection act of 1799, which authorize a visitation of vessels, within *four leagues* of our coasts, are referred to in proof of the assertion. But where is that right of visitation to be exercised? In a foreign territory, in the exclusive jurisdiction of another sovereign? Certainly not; for the very terms of the act confine it to the ocean, where all nations have a common right, and exercise a common sovereignty. And over what vessels is this right of visitation to be exercised? By the very words of the act, over our own vessels, and over foreign vessels bound to our ports, and over no others. To have gone beyond this would have been an usurpation of exclusive sovereignty on the ocean, and an exercise of an universal right of search, a right which has never yet been acknowledged by other nations, and would be resisted by none with more pertinacity than by the American. Assuming, then, the distinction to be founded in law, it is inapplicable to a case where the visitation and arrest have been in a foreign territory.

1826, March 20.—*The case of the "Marianna Flora."*¹ *Decision of the Supreme Court to the effect that American ships, offending against U. S. laws, may be seized upon the ocean, and foreign ships thus offending within the territorial jurisdiction of the U. S. may be pursued and seized upon the ocean and brought into U. S. ports for adjudication.*

STORY, Justice, delivered the opinion of the court:

In considering these points, it is necessary to ascertain, what are the rights and duties of armed, and other ships, navigating the ocean, in time of peace. It is admitted, that the right of visitation and search does not, under such circumstances, belong to the public ships of any nation. This right is strictly a belligerent right, allowed by the general consent of nations, in time of war, and limited to those occasions. It is true, that it has been held in the courts of this country, that American ships, offending against our laws, and foreign ships, in like manner, offending within our jurisdiction, may, afterwards, be pursued and seized upon the ocean and rightfully brought into our ports for adjudication. This, however, has never been supposed to draw after it any right of visitation or search. The party, in such case, seizes at his peril; if he establishes the forfeiture, he is justified; if he fails, he must make full compensation in damages.

¹ *U. S. Reports*, 11 Wheaton, 1, 42.

1842, August 1.—*Secretary of State Webster to Lord Ashburton, British Minister.*¹

A vessel on the high seas, beyond the distance of a *marine league* from the shore, is regarded as part of the territory of the nation to which she belongs, and subjected exclusively to the jurisdiction of that nation.

1848, February 2.—*Treaty of peace, friendship, limits, and settlement with the Republic of Mexico (Guadalupe Hidalgo).*²

ARTICLE 5. The boundary line between the two Republics shall commence in the Gulf of Mexico, 3 *leagues* from land, opposite the mouth of the Rio Grande. . . .

1848, August 19.—*Secretary of State Buchanan to the British Minister.*³

I have had the honor to receive your note of the 30th April last objecting, on behalf of the British Government, to that clause in the fifth article of the late treaty between Mexico and the United States by which it is declared that "the boundary line between the two Republics shall commence in the Gulf of Mexico *three leagues* from land" instead of *one league* from land, which you observe "is acknowledged by international law and practice as the extent of territorial jurisdiction over the sea that washes the coasts of states."

In answer I have to state, that the stipulation in the treaty can only affect the rights of Mexico and the United States. If for their mutual convenience it has been deemed proper to enter into such an arrangement, third parties can have no just cause of complaint. The Government of the United States never intended by this stipulation to question the rights which Great Britain or any other power may possess under the law of nations.

1849, January 23.—*Secretary of State Buchanan to Mr. Jordan.*⁴

The exclusive jurisdiction of a nation extends to the ports, harbors, bays, mouths of rivers, and adjacent parts of sea inclosed by headlands; and, also, to the distance of a *marine league*, or as far as a *cannon shot* will reach from the shore along all its coasts. Within these limits the sovereign of the mainland may arrest, by due process of law, alleged offenders on board foreign merchant ships.

¹ Moore, *International Law Digest*, vol. 2, p. 287; Wharton, vol. 1, p. 101; 6 *Webster's Works*, p. 306; Wharton, *Conflict of Laws*, paragraph 356.

² *U. S. Statutes at Large*, vol. 9, p. 926; Malloy, vol. 1, p. 1107.

³ Moore, *ibid.*, vol. 1, p. 730.

⁴ *Ibid.*, p. 705.

1853.—*Opinion of the umpire of the London Claims Commission sitting under the Convention with Great Britain of February 8, 1853, in which three marine miles is given as the extent of national jurisdiction over sea fishing.*¹

1853, December 30.—*Treaty of boundary, cession of territory, etc., with Mexico.*²

ARTICLE 1.

The Mexican Republic agrees to designate the following as her true limits with the United States for the future: Retaining the same dividing line between the two Californias as already defined and established, according to the 5th article of the treaty of Guadalupe Hidalgo, the limits between the two republics shall be as follows: Beginning in the Gulf of Mexico, *three leagues* from land, opposite the mouth of the Rio Grande, as provided in the fifth article of the treaty of Guadalupe Hidalgo; thence, as defined in the said article, up the middle of that river. . . .

1855, January 13.—*Award of the tribunal in the case of the "Washington," arbitration with Great Britain.*³

Bates, Umpire:

The schooner *Washington* was seized by the revenue schooner *Julia*, Captain Darby, while fishing in the Bay of Fundy *ten miles* from the shore, on the 10th of May 1843, on the charge of violating the treaty of 1818. She was carried to Yarmouth, Nova Scotia, and there decreed to be forfeited to the crown by the judge of the vice admiralty court, and with her stores ordered to be sold. The owners of the *Washington* claim for the value of the vessel and appurtenances, outfits, and damages, \$2,483, and for eleven years' interest, \$1,638, amounting together to \$4,121. By the recent reciprocity treaty, happily concluded between the United States and Great Britain, there seems no chance for any future disputes in regard to the fisheries. It is to be regretted that in that treaty provisions was not made for settling a few small claims, of no importance in a pecuniary sense, which were then existing, but as they have not been settled they are now brought before this commission.

The *Washington*, fishing schooner, was seized, as before stated, in the Bay of Fundy, *ten miles* from the shore, off Annapolis, Nova Scotia.

¹ See *ante*, p. 604.

² Malloy, vol. 1, p. 1121.

³ Moore, *International Arbitrations*, vol. 4, p. 4342; Sen. Ex. Doc. 103, 34th Cong., 1st sess., pp. 55, 184.

It will be seen by the treaty of 1783, between Great Britain and the United States, that the citizens of the latter, in common with the subjects of the former, enjoyed the right to take and cure fish on the shores of all parts of Her Majesty's dominions in America used by British fishermen; but not to dry fish on the Island of Newfoundland, which latter privilege was confined to the shores of Nova Scotia in the following words: "And American fishermen shall have liberty to dry and cure fish on any of the unsettled bays, harbors, and creeks of Nova Scotia, but so soon as said shores shall become settled it shall not be lawful to dry or cure fish at such settlements without a previous agreement for that purpose with the inhabitants, proprietors, or possessors of the ground."

The treaty of 1818 contains the following stipulations in relation to the fishery: Whereas differences have arisen respecting the liberty claimed by the United States to take, dry, and cure fish on certain coasts, bays, harbors, and creeks of His Britannic Majesty's dominions in America, it is agreed that the inhabitants of the United States shall have, in common with the subjects of His Britannic Majesty, the liberty to fish on certain portions of the southern, western, and northern coast of Newfoundland, and also on the coasts, bays, harbors, and creeks from Mount Joly, on the southern coast of Labrador, to and through the Straits of Belle Isle, and thence northwardly indefinitely along the coast, and that American fishermen shall have liberty to dry and cure fish in any of the unsettled bays, harbors, and creeks of said described coasts until the same become settled and the United States renounce the liberty heretofore enjoyed or claimed by the inhabitants thereof to take, dry, or cure fish on or within *three marine miles* of any of the coasts, bays, creeks, or harbors of His Britannic Majesty's dominions in America not included in the above-mentioned limits: *Provided, however*, That the American fishermen shall be admitted to enter such bays or harbors for the purpose of shelter and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever. But they shall be under such restrictions as may be necessary to prevent their taking, drying, or curing fish therein, or in any other manner whatever abusing the privileges hereby reserved to them.

The question turns, so far as relates to the treaty stipulations, on the meaning given to the word "bays" in the treaty of 1783. By that treaty the Americans had no right to dry and cure fish on the shores and bays of Newfoundland, but they had that right on the coast, bays, harbors, and creeks of Nova Scotia; and as they must land to cure fish on the shores of the bays, and creeks, they were evidently admitted to the shores of the bays, etc. By the treaty of 1818 the same right is granted to cure fish on the coasts, bays, etc., of Newfoundland, but the Americans relinquished that right and the right to fish within *three miles* of the coasts, bays, etc., of Nova Scotia. Taking it for granted .

that the framers of the treaty intended that the word "bay" or "bays" should have the same meaning in all cases, and no mention being made of headlands, there appears no doubt that the *Washington*, in fishing *ten miles* from the shore, violated no stipulations of the treaty.

It was urged on behalf of the British Government that by coasts, bays, etc., is understood an imaginary line, drawn along the coast from headland to headland, and that the jurisdiction of Her Majesty extends *three marine miles* outside of this line; thus closing all the bays on the coast or shore, and that great body of water called the Bay of Fundy against Americans and others, making the latter a British bay. This doctrine of headlands is new, and has received a proper limit in the convention between France and Great Britain of 2d August 1839, in which it is agreed that the distance of *three miles* fixed as the general limit for the exclusive right of fishery upon the coasts of the two countries shall, with respect to bays the mouths of which do not exceed *ten miles* in width, be measured from a straight line drawn from headland to headland.

The Bay of Fundy is from *65 to 75 miles* wide and *130 to 140 miles* long. It has several bays on its coast. Thus the word bay, as applied to this great body of water, has the same meaning as that applied to the Bay of Biscay, the Bay of Bengal, over which no nation can have the right to assume the sovereignty. One of the headlands of the Bay of Fundy is in the United States, and ships bound to Passamaquoddy must sail through a large space of it. The islands of Grand Menan (British) and Little Menan (American) are situated nearly on a line from headland to headland. These islands, as represented in all geographies, are situate in the Atlantic Ocean. The conclusion is, therefore, in my mind irresistible that the Bay of Fundy is not a British bay, nor a bay within the meaning of the word as used in the treaties of 1783 and 1818.

The owners of the *Washington*, or their legal representatives, are therefore entitled to compensation, and are hereby awarded not the amount of their claim, which is excessive, but the sum of three thousand dollars, due on the 15th January, 1855.

1859, December 28.—*An Act for revising and consolidating the General Statutes of the Commonwealth [Massachusetts].*¹

PART I, TITLE I, CHAPTER 1, SECTION 1. The territorial limits of this commonwealth extend *one marine league* from its seashore at low-water mark. When an inlet or arm of the sea does not exceed two marine leagues in width, between its headlands, a straight line

¹ *The General Statutes of the Commonwealth of Massachusetts*, Boston, 1860, p. 43.

from one headland to the other is equivalent to the shore line. The boundaries of counties bordering on the sea extend to the line of the state as above defined. The jurisdiction of counties separated by waters within the jurisdiction of the state is concurrent upon and over such waters.

1862, August 4.—*Secretary of State Seward to the Secretary of the Navy.*¹

This Government adheres to, recognizes, and insists upon the principle that the maritime jurisdiction of any nation covers a full *marine league* from its coast, and that acts of hostility or of authority within a *marine league* of any foreign country by naval officers of the United States are strictly prohibited, and will bring upon such officer the displeasure of this Government.

1862, December 16.—*Secretary of State Seward to Mr. Tassara, Spanish Minister.*²

The undersigned, Secretary of State of the United States, having taken the instructions of the President, will perform the duty of answering the note which was addressed to the undersigned on the 8th of October by His Excellency Señor Gabriel G. Tassara, minister plenipotentiary of Her Catholic Majesty the Queen of Spain.

In that paper Mr. Tassara informs the undersigned that Her Catholic Majesty's Government is surprised that a United States naval officer cruising in the waters of Cuba has fallen into the error of claiming that the jurisdictional belt of the island of Cuba does not extend beyond *three miles*, whereas the Government has fixed the limit at *six miles* on the open sea. Mr. Tassara proceeds under his instructions to say that in fixing that limit Her Catholic Majesty's Government has conformed to all the rules of the law of nations. Mr. Tassara next observes that the principle which is generally recognized is that maritime jurisdiction extends to the *range of a cannon ball*, and that even abiding by this principle, which every nation has modified at its will, the belt fixed by Spain goes no farther than the modern improvements in artillery. Mr. Tassara, pursuing the subject, remarks that no international compact is required for the determination or recognition of a jurisdiction which is not at all excessive, but a special treaty might be necessary for making an exception in favor of any nation and no such treaty exists between

¹ Moore, *International Law Digest*, vol. 1, p. 705.

² *Ibid.*, p. 706.

Spain and the United States. Mr. Tassara adds that the United States are so much the more obliged to respect this principle as he thinks it must be evident to the undersigned that the jurisdictional belt claimed by the United States in some cases extends many miles farther than that designated by Spain.

Mr. Tassara concludes with informing the undersigned that Her Catholic Majesty's Government trusts that the United States will cause the commanding officers of their naval forces in the Gulf to understand that the jurisdictional belt of the island of Cuba extends to *six miles* on the open sea, and that only beyond that limit is it allowed to them to exercise any act which may be in opposition to the rights of Spanish authority, and that thus all misunderstanding will cease, and the good relations of the two countries will not be liable to be disturbed by causes which ought entirely to disappear.

The undersigned would observe, in the first place, that there are two principles bearing on the subject which are universally admitted, namely, first, that the sea is open to all nations, and secondly, that there is a portion of the sea adjacent to every nation over which the sovereignty of that nation extends to the exclusion of every other political authority.

A third principle bearing on the subject is also well established, namely, that this exclusive sovereignty of a nation, thus abridging the universal liberty of the seas, extends no farther than the power of the nation to maintain it by force, stationed on the coast, extends. This principle is tersely expressed in the maxim *Terræ dominium finitur ubi finitur armorum vis*.

But it must always be a matter of uncertainty and dispute at what point the force of arms exerted on the coast can actually reach. The publicists rather advanced towards than reached a solution when they laid down the rule that the limit of the force is the *range of a cannon ball*. The *range of a cannon ball* is shorter or longer according to the circumstances of projection, and it must be always liable to change with the improvements of the science of ordnance. Such uncertainty upon a point of jurisdiction or sovereignty would be productive of many and endless controversies and conflicts. A more practical limit of national jurisdiction upon the seas was indispensably necessary, and this was found, as the undersigned thinks, in fixing the limit at *three miles* from the coast. This limit was early proposed by the publicists of all maritime nations. While it is not insisted that all nations have accepted or acquiesced and bound themselves to abide by this rule when applied to themselves, yet three points involved in the subject are insisted upon by the United States: First, that this limit has been generally recognized by nations; second, that no other general rule has been accepted; and

third, that if any State has succeeded in fixing for itself a larger limit, this has been done by the exercise of maritime power, and constitutes an exception to the general understanding which fixes the *range of a cannon shot* (when it is made the test of jurisdiction) at *three miles*. So generally is this rule accepted that writers commonly use the two expressions, of a *range of cannon shot* and *three miles*, as equivalents of each other. In other cases they use the latter expression as a substitute for the former. Thus Wildman in his "Plain directions to naval officers as to the law of search, capture, and prize" (page 12, ed. London, 1854), says: "The capture of vessels within the territory of a neutral state, or within *three miles* of the coast . . . is illegal with respect to the neutral sovereign."

Impressed by these general views, the United States are not prepared to admit that Spain, without a formal concurrence of other nations, can exercise exclusive sovereignty upon the open sea beyond a line of *three miles* from the coast, so as to deprive them of the rights common to all nations upon the open sea.

The United States admit that they have a temporary interest (during the present insurrection) to maintain a broad freedom of the seas, so as to render their naval operations as effective as may be consistent with the law of nations.

The United States admit, moreover, that they favor the principle of enlarging the liberty of the seas, in their general policy now as heretofore. But they declare at the same time that they entertain no jealousy of Spain. It need not be said anew that they have no hostile designs against her and that they have no policy which is inconsistent with her retention of the island of Cuba and her maintenance of her authority in that important part of her colonial dominions. They have, therefore, not been hasty in adopting the conclusion which the undersigned has announced upon the question which has thus been presented to them by Her Catholic Majesty's Government.

They have even taken the pains to recur to the correspondence which has heretofore passed between the two countries to obtain such light upon the subject as might be derived from that source.

Spain presented substantially the same claim to this Government in the case of the *El Dorado* in 1856, and Mr. William L. Marcy, then Secretary of State, by direction of the President, announced that the United States could not concede the extension of Spanish sovereignty beyond *three miles* in the seas which surround the island of Cuba.

Upon the grounds which have been set forth, the President feels himself obliged to decline to give to the naval commanders of the United States the instructions proposed to him by Her Catholic Majesty's Government.

In concluding, the undersigned thinks it is not unimportant to explain to Mr. Tassara the delay which has attended this reply. When Mr. Tassara's note was received, the undersigned could not close his eyes against the fact that the question presented by Mr. Tassara, although one of confessed importance, had not yet actively arisen in any proceedings or transactions which had occurred between the authorities of the two countries, and that therefore it was in one sense a speculative one. The undersigned, nevertheless, proposed to himself to enter upon the subject in a spirit of entire frankness and cordiality. At that moment, however, the case of the destruction of the so-called steamer *Blanche* or *General Rush*, by the United States war steamer *Montgomery*, as was alleged within the waters of Cuba, was brought to the knowledge of this Government by Mr. Tassara. With the imperfect information concerning that subject which this Government has until recently had, it seemed probable that it might not only appear but might even be a material point in that case that the so-called *Blanche* was fired upon by the *Montgomery* more than *three miles* from and within *six miles* of the coast of Cuba. It seemed probable to the undersigned that, in that case, he would be obliged to examine in direct connection with the case of the so-called *Blanche*, the claim of Spain to a jurisdiction outside of *three statute miles* in the waters which surround the island of Cuba, and so that instead of a speculative one the question would have become inevitably a practical one. It now appears that the injuries complained of by Spain, so far as they have been entertained in the case of the so-called *Blanche*, were committed on the very shore of the island of Cuba, and within the universally conceded and unquestioned jurisdiction of Spain. The reason for the delay of this note has thus passed away.

1863, August 10.—Secretary of State Seward to Mr. Tassara, Spanish Minister.¹

The undersigned, Secretary of State of the United States, has the honor to recur to the subject of the claim of the Government of Her Catholic Majesty to a maritime jurisdiction of *six miles*, in the waters which surround the island of Cuba. The most deliberate and respectful consideration has been bestowed in support of that claim, which have been submitted to him by Señor Gabriel G. Tassara, Her Catholic Majesty's minister plenipotentiary near the United States.

There seems to be an entire agreement between Mr. Tassara and the undersigned upon the proposition that Spain has an undoubted jurisdiction to some extent over the sea adjacent to the island of Cuba. It is upon the line of this exclusive maritime jurisdiction that

¹ Moore, *International Law Digest*, vol. 1, p. 709.

the question which is to be considered arises. The undersigned has maintained as a general principle, announced by publicists and accepted by maritime powers, that the jurisdiction of maritime nations extends *three miles* over the seas to their coasts.

Mr. Tassara is not understood to deny this proposition. But he insists that this principle has its exceptions, and that some states, and among them the United States, habitually claim and exercise a wider jurisdiction. While this fact is cheerfully admitted, it does not seem to the undersigned conclusive in favor of the claim of Spain. The exceptions are so few and so special that they do not disturb or impair the general principle that *three miles* is the legal boundary of external maritime jurisdiction. Mr. Tassara seems to assume, however, that as there are some existing and acknowledged exceptions to that principle, so there are also other existing exceptions which ought to be acknowledged, and that the jurisdiction for which he is now contending is such an exception. He very truly assumes that wherever such an exception actually exists, evidence of it will be found in the statutes or decrees of the maritime power which asserts it. As such evidence he quotes several royal decrees of Spain, some ancient and others modern, which declare that the jurisdiction of Spain in the waters which surround her coasts extends to the limit of *six miles*.

Nevertheless it can not be admitted, nor indeed is Mr. Tassara understood to claim, that the mere assertion of a sovereign, by an act of legislation, however solemn, can have the effect to establish and fix *three miles* is derived not from his own decree but from the law of nations, and exists even though he may never have proclaimed or asserted it by any decree or declaration whatsoever. He can not, by a mere decree, extend the limit and fix it at *six miles*, because if he could he could in the same manner and upon motives of interest, ambition, or even upon caprice fix it at *ten* or *twenty* or *fifty miles* without the consent or acquiescence of other powers which have a common right with himself in the freedom of all the oceans. Such a pretension could never be successfully or rightfully maintained. The statutes which Mr. Tassara has recited are therefore regarded as showing what certainly is by no means unimportant, that Spain at an early day asserted, and has on different occasions since that time re-asserted, in her domestic legislation, a claim to an exceptional jurisdiction of *three miles* in addition to the *three miles* of jurisdiction conceded by the law of nations.

A claim thus asserted and urged must necessarily be now respected and conceded by the United States if it could be shown that on its being brought to their notice they had acquiesced in it, or that on its being brought to the notice of other powers it had been so widely conceded by them as to imply a general recognition of it by the maritime

powers of the world. It is just here, however, that the claim of Spain seems to need support. Nations do not equally study each other's statute books and are not chargeable with notice of national pretensions resting upon foreign legislation. The undersigned can not admit that this claim of Spain to a maritime jurisdiction of *six miles* was recognized or admitted by the United States in the treaty of friendship, amity, and commerce between the United States and Spain, which was celebrated in 1795, insomuch as there is no evidence that this peculiar and exceptional claim of maritime jurisdiction was then brought by the one party to the knowledge of the other. The case of the *El Dorado* seems to be the only one in which this claim of Spain has been brought to the notice of this Government. In regard to that case, all that Mr. Tassara is understood to insist upon is that the Spanish Government did not renounce the claim, nor renew it, while it is not denied that this Government declined to concede it.

Within the period which has elapsed since the date of the first royal decree asserting the claim to which Mr. Tassara has directed the attention of the undersigned, there have been many and long periods of naval war, but the undersigned has not been given to understand that any maritime power having been made actually acquainted with the claim of Spain to a jurisdiction of *six miles* around the island of Cuba has acquiesced therein, or recognized the same.

It results from these remarks, that while it is admitted that on the part of Spain the claim is not one of new creation, it is practically one that has only recently been presented to the United States, and for aught that appears is entirely new to other maritime powers.

The undersigned is far from intimating that these facts furnish conclusive reasons for denying the claim a respectful consideration. On the contrary, he very cheerfully proceeds to consider a further argument, derived, as Mr. Tassara supposes, from reason and justice, which he has urged in respect to the claim. This ground is, that the shore of Cuba is, by reason of its islets and smaller rocks, such as to require that the maritime jurisdiction of Cuba, in order to purposes of effective defense and police, should be extended to the breadth of *six miles*. The undersigned has examined what are supposed to be accurate charts of the coast of Cuba, and if he is not misled by some error of the chart, or of the process of examination, he has ascertained that nearly half of the coast of Cuba is practically free from reefs, rocks, and keys, and that the seas adjacent to that part of the island which includes the great harbors of Cabanos, Havana, Matanzas, and Santiago are very deep, while in fact the greatest depth of the passage between Cuba and Florida is found within *five miles* of the coast of Cuba, off the harbor of Havana.

The undersigned has further ascertained, as he thinks, that the line of keys which confront other portions of the Cuban coast resemble, in dimensions, constitution, and vicinity to the mainland, the keys which lie off the southern Florida coast of the United States. The undersigned assumes that this line of keys is properly to be regarded as the exterior coast line, and that the inland jurisdiction ceases there, while the maritime jurisdiction of Spain begins from the exterior sea front of those keys.

In view of the considerations and facts which have been thus presented, the undersigned is obliged to state that the Government of the United States is not prepared to admit that the jurisdiction of Spain in the waters which surround the island of Cuba lawfully and rightly extends beyond the customary limit of *three miles*.

1864, June 17.—*Mr. Dayton to Secretary of State Seward.*¹

SIR: You will doubtless have received before this notice of the arrival of the *Alabama* in the port of Cherbourg, and my protest to this government against the extension of any accommodations to this vessel. M. Drouyn de l'Huys yesterday informed me that they had made up their minds to this course, and he gave me a copy of the written directions, given by the minister of marine to the vice admiral, maritime prefect at Cherbourg, a translation of which accompanies this despatch. But he at the same time informed me that the United States ship of war the *Kearsarge* had appeared off the port of Cherbourg, and there was danger of an immediate fight between those vessels. That the *Alabama* professes its entire readiness to meet the *Kearsarge*, and he believed that each would attack the other as soon as they were *three miles* off the coast. That a sea fight would thus be got up in the face of France, and at a distance from their coast within reach of the guns used on shipboard in these days. That the distance to which the neutral right of an adjoining Government extended itself from the coast was unsettled, and that the reason of the old rules, which assumed that *three miles* was the outermost reach of a cannon shot, no longer existed, and that, in a word, a fight on or about such a distance from their coast would be offensive to the dignity of France, and they would not permit it. I told him that no other rule than the *three-mile* rule was known or recognized as a principle of international law; but if a fight were to take place, and we would lose nothing and risk nothing by its being further off, I had, of course, no objection. I had no wish to wound the susceptibilities of France by getting up a fight within a distance which made the cannon shot liable to fall on her coast. I asked him if he would

¹ *Foreign Relations of the United States*, 1864-65, vol. 3, p. 104.

put his views and wishes on this question in writing, and he promised me to do so. I wrote to Captain Winslow this morning, and herewith enclose you a copy of my letter. I have carefully avoided in this communication anything which would tend to make the *Kearsarge* risk anything by yielding what seemed to me an admitted right.

To deliver this letter, and understand some other matters in respect to the alleged sale of the clipper ships at Bordeaux, I have sent my son to Cherbourg.

1864, July 2.—Secretary of State Seward to Mr. Dayton.¹

I approve of your instructions to Captain Winslow. It will be proper for you, nevertheless, while informing M. Drouyn de l'Huys that I do so in a spirit of courtesy towards France, to go further, and inform him that the United States do not admit a right of France to interfere with their ships of war at any distance exceeding *three miles*.

Especially must we disallow a claim of France so to interfere in any conflict that we find it necessary to wage in European waters with piratical vessels like the *Alabama*, built, armed, manned, and equipped, and received as a belligerent in opposition to our persistent remonstrances, to commit depredations on our commerce.

1864, September 16.—Secretary of State Seward to Mr. Burnley.²

SIR: On the 30th day of May last Commander Trenchard, of the United States steamer *Rhode Island*, while chasing the insurgent vessel the *Margaret and Jessie* in the open sea off the coast of Eluthera, in the Bahamas, fired at her at least one cannon shot, which is alleged to have reached the neutral coast. Her Britannic Majesty's Government thereupon complained to this Government that the *Rhode Island* had come and was within the distance of a *marine league*, or *three miles* from the shore when the cannon ball was fired. On investigating the complaint it did not satisfactorily appear that a cannon ball was fired by the chaser within the distance of *three miles* from the land, but, on the other hand, it was established that a Parrott gun, which was discharged, had a range of *five miles*, and that a ball from it might have reached neutral shore, although fired outside the line of maritime jurisdiction.

Upon this state of facts Her Majesty's Government have, through you, expressed a hope that the United States will concur with the

¹ *Foreign Relations of the United States, 1864–65*, vol. 3, pp. 120, 121.

² U. S. Naval War College, *International Law Situations*, 1904, p. 134.

British Government in opinion that vessels should not fire toward a neutral shore at a less distance than that which would insure shot not falling into neutral waters, or in a neutral territory. To this suggestion I at once replied, by order of the President, that the subject would be brought to the attention of other maritime powers, in order that if any change of the existing construction of the maritime law should be made it should first receive the assent of all the great maritime States.

There is reason to apprehend that the subject, although now abstractly presented, may soon become a practical question. Spain claims a maritime jurisdiction of *six miles* around the island of Cuba. In pressing this claim upon the consideration of the United States Spain has used the argument that the modern improvement in gunnery renders the ancient limit of a *marine league* inadequate to the security of neutral states.

When it is understood at Paris that an engagement was likely to come off before Cherbourg between the United States ship of war *Kearsarge* and the pirate *Alabama*, the French Government remonstrated with both parties against firing within the actual reach of the shore by cannon balls fired from their vessels, on the ground that the effect of a collision near the coast would be painful to France.

For these reasons I think that the subject may now be profitably discussed; but there are some preliminary considerations which it is deemed important to submit to Her Majesty's Government: First, that the United States, being a belligerent now when the other maritime States are at peace, are entitled to all the advantages of the existing construction of maritime law, and can not, without serious inconvenience, forego them; secondly, that the United States, adhering in war no less than when they were in the enjoyment of peace to their traditional liberality toward neutral rights, are not unwilling to come to an understanding upon the novel question which has thus been raised "in consequence of the improvement in gunnery"; but, thirdly, it is manifestly proper and important that any such new construction of the maritime law as Great Britain suggests should be reduced to the form of a precise proposition, and then that it should receive in some manner, by treaty or otherwise, reciprocal and obligatory acknowledgments from the principal maritime powers.

Upon a careful examination of the note you have addressed to me the suggestions of Her Majesty's Government seem to me to be expressed in too general terms to be made the basis of a discussion. Suppose, by way of illustration, that the utmost range of cannon now is *five miles*; are Her Majesty's Government understood to propose that the marine boundary of neutral jurisdiction, which is now *three miles* from the coast, should be extended *two miles* beyond the present limit? Again, if cannon shot are to be fired so as to fall

not only upon neutral land, but also not upon neutral waters, then supposing the range of the cannon shot to be *five miles*, are Her Majesty's Government to be understood as proposing that cannon shot shall not be fired within a distance of eight miles from the neutral territory? Finally, shall measure distances be excluded altogether from the statement, and the proposition to be agreed upon be left to extend with the increased range of gunnery; or shall there be a pronounced limit of jurisdiction, whether *five miles*, *eight miles*, or any other measured limit?

I have to request that you will submit these suggestions to your Government, to the end that they may define, with necessary precision, the amendment of maritime law which they think important, and upon which they are willing to agree with the other maritime powers.

1864, September 23.—*Instructions of United States Secretary of the Navy.*¹

This Government adheres to, recognizes, and insists upon the principle that the maritime jurisdiction of every nation covers a full *marine league* from the coast and acts of hostility or authority within that limit can not be legally exercised, and if committed or exercised will certainly bring upon the offending party the displeasure of this Government.

A vessel within a *marine league* of a neutral coast is regarded as free from interruption. It is not lawful to chase, fire at, bring to, or capture any vessel within the waters or jurisdiction of a neutral.

1864, October 16.—*Secretary of State Seward to Mr. Burnley, British Chargé.*²

SIR: On the 30th day of May last Commander Trenchard, of the United States steamer *Rhode Island*, while chasing the insurgent vessel the *Margaret and Jessie* in the open sea, off the coast of Eleuthera, in the Bahamas, fired at her at least one cannon shot, which is alleged to have reached the neutral coast. Her Britannic Majesty's government thereupon complained to this government that the *Rhode Island* had come and was within the distance of a marine league, or three miles from the shore, when the cannon ball was fired. On investigating the complaint it did satisfactorily appear that a cannon ball was

¹ *The Laws of Neutrality as Existing on August 1, 1914* (Washington, Government Printing Office, 1918), p. 158.

² *U. S. Diplomatic Correspondence*, 1864, vol. 2, p. 708.

fired by the chaser within three miles from the land; but, on the other hand, it was established that a Parrot gun, which was discharged, had a range of five miles and that a ball from it might have reached the neutral shore, although fired outside of the line of maritime jurisdiction. Upon this state of facts her Majesty's government have, through you, expressed a hope that the United States will concur with the British government in opinion that vessels should not fire towards a neutral shore at a less distance than that which would insure shot not falling in neutral waters, or in a neutral territory. To this suggestion I at once replied, by order of the President, that the subject would be brought to the attention of other maritime powers, in order that if any change of the existing construction of the maritime law should be made it should first receive the assent of all the great maritime states.

There is reason to apprehend that the subject, although now abstractly presented, may soon become a practical question. Spain claims a maritime jurisdiction of six miles around the island of Cuba. In pressing this claim upon the consideration of the United States, Spain has used the argument that the modern improvement in gunnery renders the ancient limit of a *marine league* inadequate to the security of neutral States.

When it was understood at Paris that an engagement was likely to come off before Cherbourg between the United States ship of war *Kearsarge* and the pirate *Alabama*, the French government remonstrated with both parties against firing within the actual reach of the shore by cannon balls fired from their vessels, on the ground that the effect of a collision near the coast would be painful to France.

For these reasons I think that the subject may now be profitably discussed; but there are some preliminary considerations which it is deemed important to submit to her Majesty's government: First, that the United States, being a belligerent, now when the other maritime States are at peace, are entitled to all the advantages of the existing construction of maritime law, and can not, without serious inconvenience, forego them. Secondly, that the United States, adhering in war, no less than when they were in the enjoyment of peace, to their traditional liberality towards neutral rights, are not unwilling to come to an understanding upon the novel question which has thus been raised "in consequence of the improvement in gunnery." But, thirdly. It is manifestly proper and important that any such new construction of the maritime law as Great Britain suggests should be reduced to the form of a precise proposition, and then that it should receive, in some manner, by treaty or otherwise, reciprocal and obligatory acknowledgments from the principal maritime powers.

Upon a careful examination of the note you have addressed to me, the suggestions of her Majesty's government seem to me to be expressed in too general terms to be made the basis of a discussion. Suppose, by way of illustration, that the utmost range of cannon now is five miles, are her Majesty's government understood to propose that the maritime boundary of neutral jurisdiction, which is now three miles from the coast, should be extended two miles beyond the present limit? Again, if cannon shot are to be fired so as to fall not only upon neutral land, but also not upon neutral waters, then supposing the range of cannon shot to be five miles, are her Majesty's government to be understood as proposing that cannon shot shall not be fired within a distance of eight miles from the neutral territory? Finally, shall measure distances be excluded altogether from the statement and the proposition to be agreed upon to be left to extend with the increased range of gunnery, or shall there be a pronounced limit of jurisdiction, whether five miles, eight miles, or any other measured limit?

1869, May 18.—Secretary of State Fish to the Secretary of the Navy.¹

The maritime jurisdiction of Spain may be acknowledged to extend not only to a *marine league* beyond the coast of Cuba itself, but also to the same distance from the coast line of the several islets or keys with which Cuba itself is surrounded. Any acts of Spanish authority within that line can not be called into question, provided they shall not be at variance with law or treaties.

1875, January 22.—Secretary of State Fish to Sir Edward Thornton.²

SIR: The instruction from the foreign office to Mr. Watson, of the 25th of September last, a copy of which was communicated by that gentleman to this Department, in his note of the 17th of October, directs him to ascertain the views of this Government in regard to the extent of maritime jurisdiction which can properly be claimed by any power, and whether we have ever recognized the claim of Spain to a *six-mile* limit or have ever protested against such claim.

In reply I have the honor to inform you that this Government has uniformly, under every administration which has had occasion to consider the subject, objected to the pretension of Spain adverted to, upon the same ground and in similar terms to those contained in the instruction of the Earl of Derby.

¹ Moore, *International Law Digest*, vol. 1, p. 713.

² *Foreign Relations of the United States*, 1875-76, vol. 1, p. 649.

We have always understood and asserted that, pursuant to public law, no nation can rightfully claim jurisdiction at sea beyond a *marine league* from its coast.

This opinion on our part has sometimes been said to be inconsistent with the facts that, by the laws of the United States, revenue cutters are authorized to board vessels anywhere within *four leagues* of their coasts, and that by the treaty of Guadalupe Hidalgo, so called, between the United States and Mexico, of the second of February, 1848, the boundary line between the dominions of the parties begins in the Gulf of Mexico, *three leagues* from land.

It is believed, however, that in carrying into effect the authority conferred by the act of Congress referred to, no vessel is boarded, if boarded at all, except such a one as, upon being hailed, may have answered that she was bound to a port of the United States. At all events, although the act of Congress was passed in the infancy of this Government, there is no known instance of any complaint on the part of a foreign government of the trespass by a commander of a revenue cutter upon the rights of its flag under the law of nations.

In respect to the provision in the treaty with Mexico, it may be remarked that it was probably suggested by the passage in the act of Congress referred to, and designed for the same purpose, that of preventing smuggling. By turning to the files of your legation, you will find that Mr. Bankhead, in a note to Mr. Buchanan of the 30th of April, 1848, objected, on behalf of Her Majesty's government, to the provision in question. Mr. Buchanan, however, replied in a note of the 19th of August, in that year, that the stipulation could only affect the rights of Mexico and the United States, and was never intended to trench upon the rights of Great Britain or of any other power under the law of nations.

1875, December 1.—*Secretary of State Fish to the United States Minister to Russia.*¹

There was reason to hope that the practice which formerly prevailed with powerful nations of regarding seas and bays usually of large extent near their coast as closed to any foreign commerce or fishery not specially licensed by them, was, without exception, a pretension of the past, and that no nation would claim exemption from the general rule of public law which limits its maritime jurisdiction to a *marine league* from its coast. We should particularly regret if Russia should insist on any such pretension.

¹ Moore, *International Law Digest*, vol. 1, p. 705.

1878.—*Revised Statutes of the United States*.¹

Section 2760. The officers of the revenue cutters shall respectively be deemed officers of the customs, and shall be subject to the direction of such collectors of the revenue, or other officers thereof, as from time to time shall be designated for that purpose. They shall go on board all vessels which arrive within the United States or within *four leagues* of the coast thereof, if bound for the United States, and search and examine the same, and every part thereof, and shall demand, receive, and certify the manifests required to be on board certain vessels, shall affix and put proper fastenings on the hatches and other communications with the hold of any vessel, and shall remain on board such vessels until they arrive at the port or place of their destination.

1879, April 19.—*Secretary of State Evarts to Mr. Foster*.²

An attack by Mexican officials on merchant vessels of the United States, when distant more than *three miles* from the Mexican coast, on the ground of breach of revenue laws, is an international offense, which is not cured by a decree in favor of the assailants, collusively or corruptly maintained in a Mexican court.

1881, March 3.—*Secretary of State Evarts to the United States Minister to Spain*.³

The wide contradiction between the several statements does not suffice to bring the position of three of the vessels at the time within the customary nautical league. This government must adhere to the *three-mile* rule as the jurisdictional limit, and the cases of visitation *without that line* seem not to be excused or excusable under that rule.

1882, June 5.—*An Act reestablishing the Court of Commissioners of Alabama Claims and for the distribution of the unappropriated moneys of the Geneva award*.⁴

SEC. 5. That the first class shall be for claims directly resulting from damage done on the high seas by Confederate cruisers during the late rebellion, including vessels and cargoes attacked on the high seas, although the loss or damage occurred *within four miles* of the shore, excluding claims which have been proved pursuant to section

¹ P. 538.

² Wharton, *International Law Digest*, vol. 1, p. 106.

³ *Foreign Relations of the United States*, 1881–82, pp. 1051, 1052.

⁴ *U. S. Statutes at Large*, vol. 22, p. 98.

eleven of said chapter four hundred and fifty-nine. The second class shall be for claims for the payment of premiums for war risks, whether paid to corporations, agents, or individuals, after the sailing of any Confederate cruiser.

1885, October.—*Case of the Alleganean.—Stetson v. United States, Second Court of Commissioners of "Alabama" Claims.*¹

Draper, J.:

The facts upon which a judgment to the amount of \$69,334.80 is prayed for in this case are substantially as follows:

The ship *Alleganean*, duly registered at the port of New York, and being recently repaired and well equipped and entitled to the protection of the United States, cleared with a cargo from the port of Baltimore on the 22d of October, 1862, upon a voyage to London. Six days later, at about 10.30 o'clock in the evening, being at anchor in rough water in Chesapeake Bay south of the mouth of the Rappahannock river and opposite Guinns Island, she was boarded by some eighteen officers and men of the Confederate navy, commanded by Lieutenants John Taylor Wood and S. Smith Lee. These leaders were commissioned officers in the Confederate navy, and in the attack upon the *Alleganean* they were acting under the special orders of the Secretary of the Navy of the Confederate States, and the men accompanying them had been specially detailed from the James River Squadron for the purpose of preying upon United States merchant vessels in Chesapeake Bay. They came overland to Chesapeake Bay from the *Patrick Henry*, an armed and commissioned Confederate vessel, and securing two or three small vessels—the largest being of fifteen or twenty tons' burden—had been cruising about two or three nights before the attack. . . .

This force boarded the *Alleganean*, as stated, speedily reduced the crew of that vessel to subjection and the state of prisoners of war, and then burned the ship, totally destroying her, except that some few remnants were afterward picked up and disposed of, the proceeds of which the owners account for in making up their claim.

The value of the *Alleganean* at the time of loss is placed by the marine experts on behalf of the Government at \$52,591.03, and by the witnesses for the claimants at amounts varying from \$60,000 to \$75,000.

The evidence seems to establish beyond question the fact that the vessel was more than *four miles* from any shore at the time of capture and destruction.

¹ No. 3993, class 1. Moore, *International Arbitrations*, vol. 4, p. 4332.

The claimant's counsel, with his case as exhaustively prepared and as fully and ably argued as any which has been before this Court, contends that these facts establish a right to a judgment, as of the first class, under the provisions of Sec. 5 of the Act of June 5, 1882, being a claim "directly resulting from damage done on the high seas by Confederate cruisers during the late rebellion, including vessels and cargoes attacked on the high seas, although the loss or damage occurred within *four miles* of the shore."

The learned counsel on behalf of the United States insists that the claimants ought not to recover—

First. Because all the waters of the Chesapeake Bay, even such as are more than a *marine league* from shore, are territorial waters of the United States, and subject to the exclusive control and jurisdiction thereof, and that in consequence the *Alleganean* was not attacked nor the damage done on the "high seas" within the meaning of the term as used in the act under which judgment is claimed.

The term "high seas," as used by legislative bodies, the courts, and text writers, has been construed to express a widely different meaning. As used to define the jurisdiction of admiralty courts, it is held to mean the waters of the ocean exterior to low-water mark. As used in international law, to fix the limits of the open ocean, upon which all peoples possess common rights, the "great highway of nations," it has been held to mean only so much of the ocean as is exterior to a line running parallel with the shore and some distance therefrom, commonly such distance as can be defended by artillery upon the shore, and therefore a *cannon shot* or a *marine league* (*three nautical or four statute miles*). This court, after very able argument by learned counsel and after much deliberation, has held that the term was used in the act of June 5, 1882, in the same sense in which it is employed by the international law writers. (Rich and Paine, executors, et al. *vs.* The United States.)

From this it necessarily follows that such portions of the waters of Chesapeake Bay as are within *four miles* of either shore form no part of the high seas. But much of the bay is more than *four miles* from shore, and is accessible from the ocean without coming within that distance of the land. The distance between Cape Henry and Cape Charles, at the entrance of the bay, is said to be twelve miles, and it is stated that lines starting from points between the capes, *four miles* from each, and running up the bay that distance from either shore, would not intercept each other within *one hundred and twenty-five miles* from the starting points. The evidence shows that the *Alleganean* was anchored between such lines at the time of destruction. Was she upon the high seas as the Court defines the statutory term?

By common agreement, all the authorities assert that there are arms or inlets of the ocean which are within territorial jurisdiction, and are not high seas. Sir R. Phillimore (*Int. Law*, vol. i, sec. 200) says:

Besides the rights of property and jurisdiction within the limit of *cannon shot* from the shore, there are certain portions of the sea which, though they exceed this verge, may, under special circumstances, be prescribed for. Maritime territorial rights extend, as a general rule, over arms of the sea, bays, gulfs, estuaries which are enclosed, but not entirely surrounded, by lands belonging to one and the same State. . . . Thus Great Britain has immemorially claimed and exercised exclusive property and jurisdiction over the bays or portions of the sea cut off by lines drawn from one promontory to another, and called the *King's Chambers*.

Grotius (bk. ii. chap. 3, ss. 7 & 8) and Vattel (vol. i. bk. i, chap. xxiii, s. 291). assert substantially the same doctrine, and the later writers follow them. Wheaton's *Int. Law*. (Dana's 8th ed., p. 255) says:

The maritime territory of every State extends to the ports, harbors, bays, mouths of rivers, and adjacent parts of the sea enclosed by headlands, belonging to the same State. The general usage of nations superadds to this extent of territorial jurisdiction a distance of a *marine league*, or as far as a *cannon shot* will reach from the shore, along all the coasts of the State. Within these limits, its right of property and territorial jurisdiction are absolute, and exclude those of every other nation.

Chancellor Kent avows the general doctrine and makes very much broader claims in reference to the jurisdiction of the United States over adjacent waters, and says (*Commentaries*, vol. i, pp. 29, 30):

Considering the great line of the American coasts, we have a right to claim for fiscal and defensive regulations a liberal extension of maritime jurisdiction; and it would not be unreasonable, as I apprehend, to assume for domestic purposes connected with our safety and welfare the control of waters on our coasts, though included within lands stretching from quite distant headlands, as, for instance, from Cape Ann to Cape Cod, and from Nantucket to Montauk Point, and from that point to the capes of the Delaware, and from the South Cape of Florida to the Mississippi.

Dr. Woolsey (*Int. Law*, sec. 60) upholds the general doctrine, but thinks the claims of Chancellor Kent are too broad, and rather "out of character for a nation that has ever asserted the freedom of doubtful waters, as well as contrary to the spirit of more recent times."

Dr. Wharton (*Int. Law*, sec. 192) finishes the subject with the conclusion:

That it would seem more proper to adopt the test of *cannon shot*. . . . which would, in case of waters whose headlands belong to the same sovereign, exclude all bays more than *eighteen miles* in diameter, assuming the *range of cannon shot* to be *nine miles*. But this should be made to yield to usage. If a particular nation has exercised dominion over a bay, and this has been acquiesced in by other nations, then the bay is to be regarded as belonging to such nations.

We are quite certain that none of the American courts have passed upon this subject, although decisions holding that specified waters are within or without the jurisdiction of the Admiralty courts are numerous. The question has, however, been before the English courts upon two occasions at least.

Reg. vs. Cunningham et al. (Bell's Crown Cases, 72) was the case of a crime committed upon an American vessel lying in the Bristol Channel, about *three-quarters of a mile* off the shores of the county of Glamorgan, in Wales, but below or exterior to low-water mark, and perhaps *ten miles* from the shores of the county of Somerset, in England. The prisoners were indicted and tried in Glamorgan. The question was whether the crime was committed within the county of Glamorgan or upon the high seas. It was held that it was within the county. This crime was committed, it is true, within the *marine league* from shore, but the Court did not rest its conclusion upon that ground. Lord Chief Justice Cockburn, delivering the opinion of the Court, said:

Looking at the local situation of this sea, it must be taken to belong to the counties, respectively, by the shores of which it is bounded. . . . The whole of this inland sea, between the counties of Somerset and Glamorgan, is to be considered as within the counties by the shores of which its several parts are respectively bounded.

But perhaps the most thoroughly considered and important case is that of *Direct U. S. Cable Co. vs. Anglo-American Telegraph Co.* in the House of Lords (2 App. Cs., 349). It came up on an appeal from the Supreme Court of Newfoundland against an order confirming an injunction preventing the Direct Cable Co. from landing their wire upon the soil of Newfoundland, on the ground that it would be an infringement of the rights of the Anglo-American Co. The cable, as a matter of fact, was buoyed in Conception Bay, more than a *marine league* from shore, and it nowhere came within that distance from the shore, purposely to avoid coming within territorial jurisdiction. But it was asserted that the whole of Conception Bay was within the territory and jurisdiction of Newfoundland. The Supreme Court of the Province so held, and the determination was upheld by the House of Lords in a somewhat elaborate opinion.

This opinion states that Conception Bay is a body of water having an average width of *fifteen miles*, a distance of *forty miles* from the head to one of the capes at the entrance and *fifty miles* to the other, and a distance of *twenty miles* between the headlands. Coming to the question, the Lords say (p. 419) :

We find an universal agreement that harbors, estuaries and bays, landlocked, belong to the territory of the nation which possesses the shores around them, but no agreement as to what is the rule to determine what is "bay" for this purpose. It seems generally agreed that where the configuration and dimensions of the bay are such as to show that the nation occupying the adjoining coasts also occupies the bay, it is a part of the territory; and with this idea most of the writers on the subject refer to defensibility from the shore as the test of occupation; some suggesting, therefore, a width of *cannon shot* from shore to shore; some a *cannon shot* from each shore; some an arbitrary distance of *10 miles*. All of these are rules which, if adopted, would exclude Conception Bay from the territory of Newfoundland, but also would have excluded from the territory of Great Britain that part of the Bristol Channel which in *Reg. v. Cunningham* was held to be in the county of Glamorgan.

It does not appear to their lordships that jurists and text writers are agreed what are the rules as to dimensions and configuration which, apart from other considerations, would lead to the conclusion that a bay is or is not a part of the territory of the State possessing the adjoining coasts, and it has never, that they can find, been made the ground of any judicial determination. If it were necessary in this case to lay down a rule, the difficulty of the task would not deter their lordships from attempting to fulfill it. But in their opinion it is not necessary. It seems to them that in point of fact the British Government has for a long period exercised dominion over this bay, and that their claim has been acquiesced in by other nations. . . . This would be very strong in the tribunals of any country to show that by prescription this bay is a part of the exclusive territory of Great Britain. In a British tribunal it is decisive.

We must now examine the local circumstance touching the status of Chesapeake Bay, and then determine whether those waters should be held to be the open ocean or jurisdictional waters of the United States in the light of these authorities.

The headlands are about *twelve miles* apart and the bay is probably nowhere more than *twenty miles* in width. The length may be *two hundred miles*. To call it a bay is almost a misnomer. It is more a mighty river than an arm or inlet of the ocean. It is entirely encompassed about by our own territory, and all of its numerous branches and feeders have their rise and their progress wholly in and through our own soil. It can not become an international com-

mercial highway; it is not and can not be made a roadway from one nation to another.

The second charter of King James I to the Virginia Company in the year 1609, granted—

All those lands, countries, and territories situate, lying, and being in that part of America called Virginia, from the point of land called Cape or Point Comfort, all along the seacoast to the northward *two hundred miles*, and all along the seacoast to the southward *two hundred miles*, and all that space and circuit of land lying from the seacoast of the precinct aforesaid up into the land throughout from sea to sea, west and northwest, together with all the soils, grounds, havens, ports, . . . rivers, waters, fishings, &c., &c.

This language would seem to place Chesapeake Bay within the boundary lines of Virginia. A line running north (as near as may be) from Point Comfort along the seacoast crosses the mouth of the bay from Cape Henry to Cape Charles.

By the King James charter to Lord Baltimore in 1632, erecting the territory of Maryland, the southern boundary line is made to cross Chesapeake Bay from Smiths Point, at the mouth of the Potomac river, to Watkin's Point, on the eastern shore, which apparently places a portion of this bay within the territory of Maryland. Had this not been intended, the boundary would presumably have followed the shore line around the bay.

It is a part of the common history of the country that the States of Virginia and Maryland have from their earliest territorial existence claimed jurisdiction over these waters, and it is of general knowledge that they still continue to do so.

The legislation of Congress has assumed Chesapeake Bay to be within the territorial limits of the United States. The acts of July 31, 1789, Chap. 5; Aug. 4, 1790, Chap. 35; and March 2, 1799, Chap. 128, Sec. 11, establishing revenue districts, provided that "the authority of the officers of the district (Norfolk and Portsmouth) shall extend over all the waters, shores, bays, harbors, and inlets comprehended within a line drawn from Cape Henry to the mouth of James river." By section 549, R. S., U. S., the eastern judicial district for Virginia embraces the "residue of the State" not included in the western district. The boundaries of the State include all of Chesapeake Bay south of a line running from Smith's Point to Watkins' Point, and hence the eastern district must embrace so much of the bay.

The position taken by this Government and by England and France in the matter of the British brig *Grange*, captured in Delaware Bay in 1793 by the French steamer *l'Embuscade* (*Am. State*

Papers, vol. i, pp. 147, 148), has, it seems to us, an important bearing upon the question under discussion. The brig was seized and the crew made prisoners, the two foreign Governments being at war. The British Government must have demanded that the United States compel France to release the captured vessel on the ground that the seizure was unlawful as having been made in our territorial and neutral waters. The State papers do not show this demand, but it is not material. The opinion of the Attorney General was asked and was given somewhat elaborately by Mr. Randolph. (1 *Op. Atty's-Gen'l*, 32.) It quotes the text writers and concludes that the whole of Delaware Bay is within the territorial jurisdiction of the United States, regardless of the *marine league* or *cannon-shot* limit from the shore. The learned Attorney General says:

In like manner is excluded every consideration of how far the spot of seizure was capable of being defended by the United States; for although it will not be conceded that this could not be done, yet will rather appear that the mutual rights of the States of New Jersey and Delaware up to the middle of the river supersede the necessity of such an investigation. No. The corner stone of our claim is that the United States are proprietors of the lands on both sides of the Delaware from its head to its entrance into the sea.

Acting upon the opinion of the Attorney General, the Secretary of State (Mr. Jefferson) demanded that France should make restitution of the *Grange*, and set the prisoners taken upon her at liberty, which demand was promptly and cheerfully complied with by the French Government.

If it be said that the mere claims of a nation to jurisdiction over adjacent waters are to be accepted with some degree of hesitation, then the action in reference to the *Grange* is of much weight, for there the claim made by the United States was promptly acquiesced in by two great foreign powers, when passions were excited, and when such acquiescence was greatly against the immediate interest of one of the combatants, as well as against the general interest of both.

It will hardly be said that Delaware Bay is any the less an inland sea than Chesapeake Bay. Its configuration is not such as to make it so, and the distance from Cape May to Cape Henlopen is apparently as great as that between Cape Henry and Cape Charles.

Reflection upon the subject has caused the Court to consider this question of very considerable national importance. Contingencies might arise which would make it of very grave import. The "high sea" belongs to all alike. It is the great highway of nations. One

can not lawfully do anything upon it which any other has not the right to do. One can not exercise sovereignty over it. Can an American court concede so much as to Chesapeake Bay? Other nations, by common consent of all, have well-recognized peaceable rights even in our territorial waters. Ought we to admit that they have any rights hostile to the United States, or can we permit belligerent operations between foreign nations within the shores of this bay? What injustice can be done to any other nation by the United States exercising sovereign control over these waters? What annoyance and what injury may not come to the United States through a failure to do so?

Considering, therefore, the importance of the question, the configuration of Chesapeake Bay, the fact that its headlands are well marked, and but twelve miles apart, that it and its tributaries are wholly within our own territory, that the boundary lines of adjacent States encompass it; that from the earliest history of the country it has been claimed to be territorial waters, and that the claim has never been questioned; that it can not become the pathway from one nation to another; and remembering the doctrines of the recognized authorities upon international law, as well as the holdings of the English courts as to the Bristol Channel and Conception Bay, and bearing in mind the matter of the brig *Grange* and the position taken by the Government as to Delaware Bay, we are forced to the conclusion that Chesapeake Bay must be held to be wholly within the territorial jurisdiction and authority of the Government of the United States and no part of the "high seas" within the meaning of the term as used in Sec. 5 of the act of June 5, 1872.

1886, May 28.—*Secretary of State Bayard to the Secretary of the Treasury,*¹ discussing the British fisheries question and expressing the determination to maintain the "three-mile" limit as a restriction.

We do not, in asserting this claim, deny the free right of vessels of other nations to pass on peaceful errands through this zone, provided they do not, by loitering, produce uneasiness on the shore or raise a suspicion of smuggling. Nor do we hereby waive the right of the sovereign of the shore to require that armed vessels, whose projectiles, if used for practice or warfare, might strike the shore, should move beyond cannon range of the shore when engaged in artillery practice or in battle, as was insisted on by the French Government at the time of the fight between the *Kearsarge* and the *Alabama*, in 1864, off the harbor of Cherbourg.

¹ U. S. Naval War College, *International Law Situations*, 1904, p. 136; Wharton, *International Law Digest*, vol. 1, p. 108.

1888, February 15.—*Treaty with Great Britain for the settlement of the fishery question on the Atlantic coast of North America.*¹

ARTICLE 1. The high contracting Parties agree to appoint a mixed commission to delimit, in the manner provided in this treaty, the British waters, bays, creeks, and harbors of the coasts of Canada and of Newfoundland, as to which the United States, by Article I of the Convention of the 20th October, 1818, between Great Britain and the United States, renounced forever any liberty to take, dry, or cure fish.

The *three marine miles* mentioned in Article I of the Convention of the 20th October, 1818, shall be measured seaward from low-water mark; but at every bay, creek, or harbor, not otherwise specially provided for in this treaty, such *three marine miles* shall be measured seaward from a straight line drawn across the bay, creek, or harbor, in the part nearest the entrance at the first point where the width does not exceed *ten marine miles*.

IV. At or near the following bays the limits of exclusion under Article I of the Convention of the 20th October, 1818, at points more than *three marine miles* from low-water mark, shall be established by the following lines, namely: . . .

At or near the following bays the limits of exclusion shall be *three marine miles* seaward from the following lines, namely: . . .

V. Nothing in this treaty shall be construed to include within the common waters any such interior portions of any bays, creeks, or harbors as can not be reached from the sea without passing within the *3 marine miles* mentioned in Article I of the convention of the 20th October, 1818.

1890, September 18.—*Commonwealth v. Manchester.*²

FIELD, C. J. . . . It has often been a matter of controversy how far a nation has a right to control the fisheries on its seacoast, and in the bays and arms of the sea within its territory, but the limits of this right have never been placed at less than a marine league from the coast on the open sea; and bays wholly within the territory of a nation, the headlands of which are not more than six geographical miles apart, have always been regarded as a part of the territory of the nation in which they lie. More extensive rights in these respects have been and are now claimed by some nations; but, so far as we are aware, all nations concede to each other the right to control the

¹ *British and Foreign State Papers*, vol. 79, p. 267. Not ratified.

² 152 *Massachusetts Reports*, pp. 230, 236.

fisheries within *a marine league* of the coast, and in bays within the territory the headlands of which are not more than two marine leagues apart.

1891, May 22.—Acting Secretary of State Wharton to the Secretary of the Treasury.¹

The straits of Juan de Fuca are not a great natural thoroughfare or channel of navigation in an international sense; and in view of their situation it is apprehended that any other nation can make reasonable objection to the jurisdiction of the Government of the United States and of Great Britain over their entire area. The breadth of the narrowest point is believed to be about ten miles, but is not equal to the width of the Delaware Bay and other bodies of water over which, on account of their situation, the United States have felt authorized to assume jurisdiction.

1893, August 15.—Award of the tribunal in the Bering Sea arbitration with Great Britain.²

Whereas by a Treaty between the United States of America and Great Britain, signed at Washington February the 29th, 1892, the ratifications of which by the Governments of the two countries were exchanged at London on May the 7th, 1892, it was, amongst other things, agreed and concluded that the questions which had arisen between the Government of the United States of America and the Government of Her Britannic Majesty, concerning the jurisdictional rights of the United States in the waters of Bering Sea, and concerning also the preservation of the fur seal in or habitually resorting to the said sea, and the rights of the citizens and subjects of either country as regards the taking of fur seals in or habitually resorting to the said waters, should be submitted to a Tribunal of Arbitration to be composed of seven arbitrators. . . .

And whereas by Article VI of the said Treaty, it was further provided as follows:

In deciding the matters submitted to the said arbitrators, it is agreed that the following five points shall be submitted to them in order that their award shall embrace a distinct decision upon each of said five points, to wit:

1. What exclusive jurisdiction in the sea now known as the Bering Sea, and what exclusive rights in the seal fisheries therein, did Rus-

¹ Moore, *International Law Digest*, vol. 1, p. 658.

² Moore, *International Arbitrations*, vol. 1, p. 945.

sia assert and exercise prior and up to the time of the cession of Alaska to the United States?

2. How far were these claims of jurisdiction as to the seal fisheries recognized and conceded by Great Britain?

3. Was the body of water now known as the Bering Sea included in the phrase *Pacific Ocean*, as used in the Treaty of 1825 between Great Britain and Russia; and what rights, if any, in the Bering Sea were held and exclusively exercised by Russia after said Treaty?

4. Did not all the rights of Russia as to jurisdiction and as to the seal fisheries in Bering Sea east of the water boundary, in the Treaty between the United States and Russia of the 30th March, 1867, pass unimpaired to the United States under that Treaty?

5. Has the United States any right, and if so, what right of protection or property in the fur seals frequenting the islands of the United States in Bering Sea when such seals are found outside the ordinary *three-mile limit*?

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As to the first of the said five points, we, the said Baron de Courcel, Mr. Justice Harlan, Lord Hannen, Sir John Thompson, Marquis Visconti Venosta, and Mr. Gregers Gram, being a majority of the said arbitrators, do decide and determine as follows:

By the Ukase of 1821, Russia claimed jurisdiction in the sea now known as the Bering's Sea, to the extent of *one hundred Italian miles* from the coasts and islands belonging to her, but, in the course of the negotiations which led to the conclusion of the Treaties of 1824 with the United States and of 1825 with Great Britain, Russia admitted that her jurisdiction in the said sea should be restricted to the reach of *cannon shot* from the shore, and it appears that, from that time up to the time of the cession of Alaska to the United States, Russia never asserted in fact or exercised any exclusive jurisdiction in Bering's Sea, or any exclusive rights in the seal fisheries therein beyond the ordinary limit of territorial waters.

As to the second of the said five points, we, the said Baron de Courcel, Mr. Justice Harlan, Lord Hannen, Sir John Thompson, Marquis Visconti Venosta, and Mr. Gregers Gram, being a majority of the said arbitrators, do decide and determine that Great Britain did not recognize or concede any claim, upon the part of Russia to exclusive jurisdiction as to the seal fisheries in Bering Sea, outside of ordinary territorial waters.

As to the third of the said five points, as to so much thereof as requires us to decide whether the body of water now known as the Bering Sea was included in the phrase *Pacific Ocean*, as used in the Treaty of 1825 between Great Britain and Russia, we, the said arbitrators, do unanimously decide and determine that the body of water

now known as the Bering Sea was included in the phrase "Pacific Ocean" as used in the said Treaty.

And as to so much of the said third point as requires us to decide what rights, if any, in the Bering Sea were held and exclusively exercised by Russia after the said Treaty of 1825, we, the said Baron de Courcel, Mr. Justice Harlan, Lord Hannen, Sir John Thompson, Marquis Visconti Venosta, and Mr. Gregers Gram, being a majority of the said arbitrators, do decide and determine that no exclusive rights of jurisdiction in Bering Sea and no exclusive rights as to the seal fisheries therein, were held or exercised by Russia outside of ordinary territorial waters after the Treaty of 1825.

As to the fourth of the said five points, we, the said arbitrators, do unanimously decide and determine that all the rights of Russia as to jurisdiction and as to the seal fisheries in Bering Sea, east of the water boundary, in the Treaty between the United States and Russia of the 30th of March, 1867, did pass unimpaired to the United States under the said Treaty.

As to the fifth of the said five points, we, the said Baron de Courcel, Lord Hannen, Sir John Thompson, Marquis Visconti Venosta and Mr. Gregers Gram, being a majority of the said arbitrators, do decide and determine that the United States has not any right of protection or property in the fur seals frequenting the islands of the United States in Bering Sea, when such seals are found outside the ordinary *three-mile limit*.

And whereas the aforesaid determination of the foregoing questions as to the exclusive jurisdiction of the United States mentioned in Article VI leaves the subject in such a position that the concurrence of Great Britain is necessary to the establishment of regulations for the proper protection and preservation of the fur seal in or habitually resorting to the Bering Sea, the Tribunal having decided by a majority as to each article of the following regulations, we, the said Baron de Courcel, Lord Hannen, Marquis Visconti Venosta, and Mr. Gregers Gram, assenting to the whole of the nine articles of the following regulations, and being a majority of the said arbitrators, do decide and determine in the mode provided by the Treaty, that the following concurrent regulations outside the jurisdictional limits of the respective Governments are necessary and that they should extend over the waters hereinafter mentioned, that is to say:

ARTICLE 1. The Governments of the United States and of Great Britain shall forbid their citizens and subjects respectively to kill, capture or pursue at any time and in any manner whatever, the animals commonly called fur seals, within a zone of *sixty miles* around the *Pribilov Islands*, inclusive of the territorial waters.

The miles mentioned in the preceding paragraph are *geographical miles*, of *sixty* to a degree of latitude.

ARTICLE 2. The two Governments shall forbid their citizens and subjects respectively to kill, capture or pursue, in any manner whatever, during the season extending each year from the 1st May to the 31st July, both inclusive, the fur seals on the high sea, in the part of the Pacific Ocean, inclusive of the Bering Sea, which is situated to the north of the 35th degree of north latitude, and eastward of the 180th degree of longitude from Greenwich till it strikes the water boundary described in Article 1 of the Treaty of 1867 between the United States and Russia, and following that line up to Bering Straits.

1894, May 4.—*Agreement with Russia for a modus vivendi in relation to the fur-seal fisheries in Bering Sea and the North Pacific Ocean, and establishing a territorial extent of ten miles from the Russian coasts and thirty miles from islands.*¹

1896, February 15.—*Secretary of State Olney to the Netherland Minister.*²

In conformity with your recent oral request, I have now the honor to make further response to your unofficial note of November 5 last, which was acknowledged on the 9th of the same month, by informing you that careful consideration would be given to the important inquiry therein made as to the views of the United States Government touching the expediency of settling by treaty among the interested powers the question of the extent of territorial jurisdiction over maritime waters.

This Government would not be indisposed, should a sufficient number of maritime powers concur in the proposition, to take part in an endeavor to reach an accord having the force and effect of international law as well as of conventional regulation, by which the territorial jurisdiction of a State, bounded by the high seas, should henceforth extend *6 nautical miles* from low-water mark, and at the same time providing that this *six-mile limit* shall also be that of the neutral maritime zone.

I am unable, however, to express the views of this Government upon the subject more precisely at the present time, in view of the important consideration to be given to the question of the effect of such a modification of existing international and conventional law upon the jurisdictional boundaries of adjacent States and the application of existing treaties in respect to the doctrine of headlands and bays.

¹ See *ante*, p. 621.

² Moore, *International Law Digest*, vol. 1, p. 734.

I need scarcely observe to you that an extension of the headland doctrine, by making territorial all bays situated within promontories *twelve miles* apart instead of six, would affect bodies of water now deemed to be high seas and whose use is the subject of existing conventional stipulations.

1900, June 27.—*The United States Naval War Code of 1900.*¹

ARTICLE 2. The area of maritime warfare comprises the high seas or other waters that are under no jurisdiction and the territorial waters of belligerents. Neither hostilities nor any belligerent right, such as that of visitation and search, shall be exercised in the territorial waters of neutral States.

The territorial waters of a State extend seaward to the distance of *a marine league* from the low-water mark of its coast line. They also include, to a reasonable extent, which is in many cases determined by usage, adjacent parts of the sea, such as bays, gulfs, and estuaries inclosed within headlands; and where the territory by which they are inclosed belongs to two or more States, the marine limits of such States are usually defined by conventional lines.

1901, November 18.—*Treaty with Great Britain to facilitate the construction of a ship canal.*²

ARTICLE 3, SECTION 5. The provisions of this Article shall apply to waters adjacent to the canal, within *3 marine miles* of either end. Vessels of war of a belligerent shall not remain in such waters longer than twenty-four hours at any one time, except in case of distress, and in such case, shall depart as soon as possible; but a vessel of war of one belligerent shall not depart within twenty-four hours from the departure of a vessel of war of the other belligerent.

1902, July 4.—*Declaration relative to the extent of jurisdiction claimed over the bordering waters of the Bering Sea.*³

The Government of the United States claims, neither in Bering Sea nor in its other bordering waters, an extent of jurisdiction greater than a *marine league* from its shores, but bases its claims to such jurisdiction upon the following principle:

¹ U. S. Naval War College, *International Law Discussions*, 1903, pp. 101, 103.

² Malloy, vol. 1, p. 783.

³ Declaration of Mr. Herbert H. D. Peirce, agent of the United States in the *O. H. White* case, Russian arbitration, in reply to the question asked by Mr. T. M. C. Asser, arbitrator. It was made under the specific authority received by him from the Secretary of State of the United States on July 3, 1902. *Foreign Relations of the United States*, 1902, Appendix I, pp. 440, 461.

The Government of the United States claims and admits the jurisdiction of any State over its territorial waters only to the extent of a *marine league*, unless a different rule is fixed by treaty between two States; even then the treaty States are alone affected by the agreement.

1909, October 4.—*Contention in the North Atlantic Coast Fisheries Arbitration.*¹

5. The position of the United States with reference to question 5 is that the distance of “*3 marine miles* of any of the coasts, bays, creeks, or harbors” referred to in the said article, must be measured from low-water mark following the indentations of the coast; and the United States requests the tribunal to answer and decide this question accordingly.

1910, September 7.—*Award of the tribunal in the North Atlantic Coast Fisheries Arbitration with Great Britain.*²

QUESTION V.

From where must be measured the “*three marine miles* of any of the coasts, bays, creeks, or harbors” referred to in the said article?

In regard to this question, Great Britain claims that the renunciation applies to all bays generally and

The United States contend that it applies to bays of a certain class or condition.

Now, considering that the treaty used the general term “bays” without qualification, the Tribunal is of opinion that these words of the treaty must be interpreted in a general sense as applying to every bay on the coast in question that might be reasonably supposed to have been considered as a bay by the negotiators of the treaty under the general conditions then prevailing, unless the United States can adduce satisfactory proof that any restrictions or qualifications of the general use of the term were or should have been present to their minds.

And for the purpose of such proof the United States contend:

(1) That while a State may renounce the treaty right to fish in foreign territorial waters, it can not renounce the natural right to fish on the high seas.

But the Tribunal is unable to agree with this contention. Because though a State can not grant rights on the high seas, it certainly can abandon the exercise of its rights to fish on the high seas within cer-

¹ *North Atlantic Coast Fisheries Arbitration* (U. S. Sen. Doc. No. 870, 61st Cong., 3d sess.), vol. 1, pp. 10, 248.

² *Ibid.*, vol. 1, p. 92.

tain definite limits. Such an abandonment was made with respect to their fishing rights in the waters in question by France and Spain in 1763. By a convention between the United Kingdom and the United States in 1846 the two countries assumed ownership over waters in Fuca Straits at distances from the shore as great as *17 miles*.

3. The United States also contend that the term "bays of His Britannic Majesty's Dominions" in the renunciatory clause must be read as including only those bays which were under the territorial sovereignty of Great Britain.

But the Tribunal is unable to accept this contention:

(a) Because the description of the coast on which the fishery is to be exercised by the inhabitants of the United States is expressed throughout the treaty of 1818 in geographical terms and not by reference to political control; the treaty describes the coast as contained between capes.

(b) Because to express the political concept of dominion as equivalent to sovereignty, the word "dominion" in the singular would have been an adequate term and not "dominions" in the plural; this latter term having a recognized and well-settled meaning as descriptive of those portions of the earth which owe political allegiance to His Majesty, *e. g.*, "His Majesty's Dominions beyond the Seas."

4. It has been further contended by the United States that the renunciation applies only to bays *six miles* or less in width "inter fauces terrae," those bays only being territorial bays because the *three-mile* rule is, as shown by this treaty, a principle of international law applicable to coasts and should be strictly and systematically applied to bays.

But the Tribunal is unable to agree with this contention:

(a) Because admittedly the geographical character of a bay contains conditions which concern the interests of the territorial sovereign to a more intimate and important extent than do those connected with the open coast. Thus conditions of national and territorial integrity, of defense, of commerce, and of industry are all vitally concerned with the control of the bays penetrating the national coast line. This interest varies, speaking generally, in proportion to the penetration inland of the bay; but as no principle of international law recognizes any specified relation between the concavity of the bay and the requirements for control by the territorial sovereignty, this Tribunal is unable to qualify by the application of any new principle its interpretation of the treaty of 1818 as excluding bays in general from the strict and systematic application of the *three-mile* rule: nor can this Tribunal take cognizance in this connection of other principles concerning the territorial sovereignty

over bays, such as *ten-mile* or *twelve-mile* limits of exclusion based on international acts subsequent to the treaty of 1818 and relating to coasts of a different configuration and conditions of a different character;

(b) Because the opinion of jurists and publicists quoted in the proceedings conduce to the opinion that, speaking generally, the *three-mile* rule should not be strictly and systematically applied to bays;

(c) Because the treaties referring to these coasts, antedating the treaty of 1818, made special provisions as to bays, such as the treaties of 1686 and 1713 between Great Britain and France. Likewise Jay's Treaty of 1794, article 25, distinguished bays from the space "within cannon shot of the coast" in regard to the right of seizure in times of war. If the proposed treaty of 1806 and the treaty of 1818 contained no disposition to that effect, the explanation may be found in the fact that the first extended the marginal belt to *five miles*, and also in the circumstance that the American proposition of 1818 in that respect was not limited to "bays," but extended to "chambers formed by headlands" and to "*five marine miles* from a right line from one headland to another," a proposition which in the times of the Napoleonic wars would have affected to a very large extent the operations of the British navy;

(d) Because it has not been shown by the documents and correspondence in evidence here that the application of the *three-mile rule* to bays was present to the minds of the negotiators in 1818, and they could not reasonably have been expected either to presume it or to provide against its presumption;

(e) Because it is difficult to explain the words in Article III of the treaty under interpretation "country . . . together with its bays, harbors and creeks" otherwise than that all bays without distinction as to their width were, in the opinion of the negotiators, part of the territory;

(f) Because from the information before this Tribunal it is evident that the *three-mile* rule is not applied to bays strictly or systematically either by the United States or by any other Power;

(g) It has been recognized by the United States that bays stand apart, and that in respect of them territorial jurisdiction may be exercised farther than the marginal belt in the case of Delaware Bay by the report of the United States Attorney General of May 19th, 1793; and the letter of Mr. Jefferson to Mr. Genet of November 8th, 1793, declares the bays of the United States generally to be "as being landlocked, within the body of the United States."

5. In this latter regard it is further contended by the United States that such exceptions only should be made from the application of the *three-mile* rule to bays as are sanctioned by conventions and estab-

lished usage; that all exceptions for which the United States of America were responsible are so sanctioned; and that His Majesty's Government are unable to provide evidence to show that the bays concerned by the treaty of 1818 could be claimed as exceptions on these grounds either generally, or, except possibly in one or two cases, specifically.

But the Tribunal, while recognizing that conventions and established usage might be considered as the basis for claiming as territorial those bays which on this ground might be called historic bays, and that such claim should be held valid in the absence of any principle of international law on the subject, nevertheless is unable to apply this, *a contrario*, so as to subject the bays in question to the *three-mile* rule as desired by the United States:

(a) Because Great Britain has during this controversy asserted a claim to these bays generally and has enforced such claim specifically in statutes or otherwise in regard to the more important bays, such as Chaleurs, Conception, and Miramichi;

(b) Because neither should such relaxations of this claim, as are in evidence, be construed as renunciations of it; nor should omissions to enforce the claim in regard to bays as to which no controversy arose be so construed. Such a construction by this Tribunal would not only be intrinsically inequitable, but internationally injurious, in that it would discourage conciliatory diplomatic transactions and encourage the assertion of extreme claims in their fullest extent;

(c) Because any such relaxations in the extreme claim of Great Britain in its international relations are compensated by recognitions of it in the same sphere by the United States; notably in relations with France, for instance, in 1823, when they applied to Great Britain for the protection of their fishery in the bays on the western coast of Newfoundland, whence they had been driven by French war vessels on the ground of the pretended exclusive right of the French. Though they never asserted that their fishermen had been disturbed within the *three-mile zone*, only alleging that the disturbance had taken place in the bays, they claimed to be protected by Great Britain for having been molested in waters which were, as Mr. Rush stated, "clearly within the jurisdiction and sovereignty of Great Britain."

6. It has been contended by the United States that the words "coasts, bays, creeks, or harbors" are here used only to express different parts of the coast, and are intended to express and be equivalent to the word "coast," whereby the *three marine miles* would be measured from the sinuosities of the coast and the renunciation would apply only to the waters of bays within *three miles*.

But the Tribunal is unable to agree with this contention:

(a) Because it is a principle of interpretation that words in a document ought not to be considered as being without any meaning if there is not specific evidence to that purpose, and the interpretation referred to would lead to the consequence, practically, of reading the words "bays, creeks, and harbors" out of the treaty; so that it would read "within *three miles* of any of the coasts," including therein the coasts of the bays and harbors;

(b) Because the word "therein" in the proviso—"restrictions necessary to prevent their taking, drying, or curing fish therein," can refer only to "bays," and not to the belt of *three miles* along coast; and can be explained only on the supposition that the words "bays, creeks, and harbors" are to be understood in their usual ordinary sense and not in an artificially restricted sense of bays within the *three-mile belt*;

(c) Because the practical distinction for the purpose of this fishery between coasts and bays and the exceptional conditions pertaining to the latter has been shown from the correspondence and the documents in evidence, especially the treaty of 1783, to have been in all probability present to the minds of the negotiators of the treaty of 1818;

(d) Because the existence of this distinction is confirmed in the same article of the treaty by the proviso permitting the United States fishermen to enter bays for certain purposes;

(e) Because the word "coasts" is used in the plural form, whereas the contention would require its use in the singular;

(f) Because the Tribunal is unable to understand the term "bays" in the renunciatory clause in other than its geographical sense, by which a bay is to be considered as an indentation of the coast, bearing a configuration of a particular character, easy to determine specifically, but difficult to describe generally.

The negotiators of the treaty of 1818 did probably not trouble themselves with subtle theories concerning the notion of "bays"; they most probably thought that everybody would know what was a bay. In this popular sense the term must be interpreted in the treaty. The interpretation must take into account all the individual circumstances which, for any one of the different bays, are to be appreciated; the relation of its width to the length of penetration inland; the possibility and the necessity of its being defended by the State in whose territory it is intended; the special value which it has for the industry of the inhabitants of its shores; the distance which it is secluded from the highways of nations on the open sea and other circumstances not possible to enumerate in general.

For these reasons the Tribunal decides and awards:

In case of bays the *three marine miles* are to be measured from a straight line drawn across the body of water at the place where it ceases to have the configuration and characteristics of a bay. At all

other places the *three marine miles* are to be measured following the sinuosities of the coast.

But considering the Tribunal cannot overlook that this answer to question V, although correct in principle, and the only one possible in view of the want of a sufficient basis for a more concrete answer, is not entirely satisfactory as to its practical applicability, and that it leaves room for doubts and differences in practice: Therefore the Tribunal considers it its duty to render the decision more practicable and to remove the danger of future differences by adjoining to it a recommendation in virtue of the responsibilities imposed by Article IV of the special agreement.

Considering, moreover, that in treaties with France, with the North German Confederation and the German Empire, and likewise in the North Sea Convention, Great Britain has adopted for similar cases the rule that only bays of ten miles width should be considered as those wherein the fishing is reserved to nationals: And that in the course of negotiations between Great Britain and the United States a similar rule has been on various occasions proposed and adopted by Great Britain in instructions to the naval officers stationed on these coasts: And that though these circumstances are not sufficient to constitute this a principle of international law, it seems reasonable to propose this rule with certain exceptions, all the more that this rule, with such exceptions, has already formed the basis of an agreement between the two Powers.

Now, therefore, this Tribunal, in pursuance of the provisions of Article IV, hereby recommends for the consideration and acceptance of the High Contracting Parties the following rules and method of procedure for determining the limits of the bays hereinbefore enumerated:

1. In every bay not hereinafter specifically provided for the limits of exclusion shall be drawn *three miles* seaward from a straight line across the bay in the part nearest the entrance at the first point where the width does not exceed *ten miles*.

2. In the following bays, where the configuration of the coasts and the local climatic conditions are such that foreign fishermen, when within the geographic headlands, might reasonably and *bona fide* believe themselves on the high seas, the limits of exclusion shall be drawn in each case between the headlands hereinafter specified as being those at and within which such fishermen might be reasonably expected to recognize the bay under average conditions.

For the Baie des Chaleurs the line from the light at Birch Point on Miscou Island to Macquereau Point Light; for the Bay of Miramichi, the line from the light at Point Escuminac to the light on the eastern point of Tabisintac Gully; for Egmont Bay, in Prince Edward Island, the line from the light at Cape Egmont to the light at

West Point; and off St. Ann's Bay, in the Province of Nova Scotia, the line from the light at Point Anconi to the nearest point on the opposite shore of the mainland.

For Fortune Bay, in Newfoundland, the line from Connaigre Head to the light on the southeasterly end of Brunet Island, thence to Fortune Head.

For or near the following bays the limits of exclusion shall be *three marine miles* seawards from the following lines, namely:

For or near Barrington Bay, in Nova Scotia, the line from the light on Stoddart Island to the light on the south point of Cape Sable, thence to the light at Baccaro Point; at Chedabucto and St. Peter's Bays, the line from Cranberry Island light to Green Island Light, thence to Point Rouge; for Mira Bay, the line from the light on the east point of Scarari Island to the northeasterly point of Cape Morien; and at Placentia Bay, in Newfoundland, the line from Latine Point, on the eastern mainland shore, to the most southerly point of Red Island, thence by the most southerly point of Mersheen Island to the mainland.

Long Island and Bryer Island on St. Mary's Bay, in Nova Scotia, shall for the purpose of delimitation be taken as the coasts of such bays.

It is understood that nothing in these rules refers either to Bay of Fundy considered as a whole apart from its bays and creeks or as to the innocent passage through the Gut of Canso, which were excluded by the agreement made by exchange of notes between Mr. Bacon and Mr. Bryce, dated February 21st, 1909, and March 4th, 1909; or to Conception Bay, which was provided for by the decision of the Privy Council in the case of the Direct United States Cable Company v. the Angle-American Telegraph Company, in which decision the United States have acquiesced.

Dissenting Opinion of Dr. Drago.¹

Now, it must be stated in the first place that there does not seem to exist any general rule of international law which may be considered final, even in what refers to the marginal belt of territorial waters. The old rule of the *cannon shot*, crystallized into the present *three marine miles* measured from low-water mark, may be modified at a later period, inasmuch as certain nations claim a wider jurisdiction and an extension has already been recommended by the Institute of International Law. There is an obvious reason for that. The marginal strips of territorial waters, based originally on the *cannon shot*, was founded on the necessity of the riparian State to protect itself from outward attack, by providing something in the nature

¹ *North Atlantic Coast Fisheries Arbitration* (U. S. Sen. Doc. No. 870, 61st Cong., 3d sess.), vol. 1, p. 104.

of an insulating zone, which very reasonably should be extended with the accrued possibility of offense due to the wider range of modern ordnance. In what refers to bays it has been proposed as a general rule (subject to certain important exceptions) that the marginal belt of territorial waters should follow the sinuosities of the coast more or less in the manner held by the United States in the present contention, so that the marginal belt being of *three miles*, as in the treaty under consideration, only such bays should be held as territorial as have an entrance not wider than *six miles*. (See Sir Thomas Barclay's Report to Institute of International Law, 1894, page 129, in which he also strongly recommends these limits.) This is the doctrine which Westlake, the eminent English writer on international law, has summed up in a very few words: "As to bays," he says, "if the entrance to one of them is not more than twice the width of the littoral sea enjoyed by the country in question—that is, not more than *six sea miles* in the ordinary case, *eight* in that of Norway, and so forth—there is no access from the open sea to the bay except through the territorial water of that country, and the inner part of the bay will belong to that country no matter how widely it may expand. The line drawn from shore to shore at the part where, in approaching from the open sea, the width first contracts to that mentioned, will take the place of the line of low water, and the littoral sea belonging to the State will be measured outwards from that line to the distance of *three miles* or more, proper to the State;" (Westlake, vol. 1, page 187). But the learned author takes care to add: "But although this is the general rule it often meets with an exception in the case of bays which penetrate deep into the land and are called gulfs. Many of these are recognized by immemorial usage as territorial sea of the States into which they penetrate, notwithstanding that their entrance is wider than the general rule for bays which would give as a limit for such appropriation." And he proceeds to quote as examples of this kind the Bay of Conception in Newfoundland, which he considers as wholly British, Chesapeake and Delaware Bays, which belong to the United States, and others. (*Ibid.*, page 188.) The Institute of International Law, in its annual meeting of 1894, recommended a marginal belt of *six miles* for the general line of the coast, and as a consequence established that for bays the line should be drawn up across at the nearest portion of the entrance toward the sea where the distance between the two sides does not exceed *twelve miles*. But the learned association very wisely added a proviso to the effect, "that bays should be so considered and measured *unless a continuous and established usage* has sanctioned a greater breadth." Many great authorities are agreed as to that. Counsel for the United States proclaimed the right to the exclusive

jurisdiction of certain bays, no matter what the width of their entrance should be, when the littoral nation has asserted its right to take it into their jurisdiction upon reasons which go always back to the doctrine of protection. Lord Blackburn, one of the most eminent of English judges, in delivering the opinion of the Privy Council about Conception Bay in Newfoundland, adhered to the same doctrine when he asserted the territoriality of that branch of the sea, giving as a reason for such finding "that the British Government for a long period had exercised dominion over this bay, and its claim had been acquiesced in by other nations, so as to show that the bay had been for a long time occupied exclusively by Great Britain, a circumstance which, in the tribunals of any country, would be very important." "And moreover," he added, "the British Legislature has, by Acts of Parliament, declared it to be part of the British territory, and part of the country made subject to the legislation of Newfoundland." (*Direct U. S. Cable Co. v. The Anglo-American Telegraph Co.*, Law Reports, 2 Appeal Cases, 374.)

So it may safely be asserted that a certain class of bays, which might be properly called the historical bays, such as Chesapeake Bay and Delaware Bay, in North America, and the great estuary of the Riva Plata, in South America, form a class distinct and apart, and undoubtedly belong to the littoral country, whatever be their depth of penetration and the width of their mouths, when such country has asserted its sovereignty over them, and particular circumstances, such as geographical configuration, immemorial usage, and, above all, the requirements of self-defense, justify such a pretension. The right of Great Britain over the bays of Conception, Chaleur, and Miramichi are of this description. In what refers to the other bays, as might be termed the common, ordinary bays indenting the coasts, over which no special claim or assertion of sovereignty has been made, there does not seem to be any other general principle to be applied than the one resulting from the custom and usage of each individual nation, as shown by their treaties and their general and time-honored practice.

The well-known words of Bynkershoek might be very appropriately recalled in this connection when so many and divergent opinions and authorities have been recited: "The common law of nations," he says, "can only be learnt from reason and custom. I do not deny that authority may add weight to reason, but I prefer to seek it in a constant custom of concluding treaties in one sense or another and in examples that have occurred in one country or another." (*Questiones Jure Publici*, vol. 1, Cap. 3.)

It is to be borne in mind in this respect that the tribunal has been called upon to decide, as the subject matter of this controversy, the

construction to be given to the fishery treaty of 1818 between Great Britain and the United States. And so it is that from the usage and the practice of Great Britain in this and other like fisheries, and from treaties entered into by them with other nations as to fisheries, may be evolved the right interpretation to be given to the particular convention which has been submitted. In this connection the following treaties may be recited:

[Here are quoted pertinent parts of: (1) Articles 9 and 10 of the Treaty of August 2, 1839, between Great Britain and France (*ante*, p. 524); (2) Articles 2 and 3 of the Regulations of May 24, 1843, between Great Britain and France (*ante*, p. 524); (3) Article 1 of the Treaty of November 11, 1867, between Great Britain and France (*ante*, p. 525); (4) The British notice to fishermen fishing off the coasts of North Germany, dated November, 1868 (*ante*, p. 555); (5) The British notice to fishermen fishing off the coasts of the German Empire, dated December, 1874 (*ante*, p. 558); (6) Article 2 of the Treaty of May 6, 1882, between Great Britain, Belgium, Denmark, France, Germany, and the Netherlands for regulating the police of the North Sea fisheries (*ante*, p. 486); (7) The British Order in Council of October 23, 1877 (*ante*, p. 568).]

To this list may be added the unratified treaty of 1888 between Great Britain and the United States, which is so familiar to the tribunal. Such unratified treaty contains an authoritative interpretation of the Convention of October 20th, 1818, *sub judice*: "The *three marine miles* mentioned in Article 1 of the Convention of October 20th, 1818, shall be measured seaward from low-water mark; but at every bay, creek, or harbor not otherwise specifically provided for in this treaty such *three marine miles* shall be measured seaward from a straight line drawn across the bay, creek, or harbor in the part nearest the entrance at the first point where the width does not exceed *ten marine miles*," which is recognizing the exceptional bays as aforesaid and laying the rule for the general and common bays.

It has been suggested that the treaty of 1818 ought not to be studied as hereabove in the light of any treaties of a later date, but rather be referred to such British international conventions as preceded it and clearly illustrate, according to this view, what were at the time the principles maintained by Great Britain as to their sovereignty over the sea and over the coast and the adjacent territorial waters. In this connection the treaties of 1686 and 1713 with France and of 1763 with France and Spain have been recited and offered as examples also of exclusion of nations by agreement from fishery rights on the high seas. I can not partake of such a view. The treaties of 1686, 1713, and 1763 can hardly be understood with respect to this, otherwise than as examples of the wild, obsolete

claims over the common ocean which all nations have of old abandoned with the progress of an enlightened civilization. And if certain nations accepted long ago to be excluded by convention from fishing on what is to-day considered a common sea, it is precisely because it was then understood that such tracts of water, now free and open to all, were the exclusive property of a particular power who, being the owners, admitted or excluded others from their use. The treaty of 1818 is in the meantime one of the few which mark an era in the diplomacy of the world. As a matter of fact, it is the very first which commuted the rule of the *cannon shot* into the *three marine miles* of coastal jurisdiction. And it really would appear unjustified to explain such historic document by referring it to international agreements of a hundred and two hundred years before when the doctrine of Selden's *Mare Clausum* was at its height and when the coastal waters were fixed at such distances as *sixty miles*, or a *hundred miles*, or two days' journey from the shore, and the like. It seems very appropriate, on the contrary, to explain the meaning of the treaty of 1818 by comparing it with those which immediately followed and established the same limit of coastal jurisdiction. As a general rule, a treaty of a former date may be very safely construed by referring it to the provisions of like treaties made by the same nation on the same matter at a later time. Much more so when, as occurs in the present case, the later conventions, with no exception, starting from the same premise of the *three miles* coastal jurisdiction arrive always to an uniform policy and line of action in what refers to bays. As a matter of fact, all authorities approach and connect the modern fishery treaties of Great Britain, and refer them to the treaty of 1818. The second edition of Klüber, for instance, quotes in the same sentence the treaties of October 20th, 1818, and August 2, 1839, as fixing a distance of *three miles* from low-water mark for coastal jurisdiction. And Fiori, the well-known Italian jurist, referring to the same *marine miles* of coastal jurisdiction, says: "This rule, recognized as early as the treaty of 1818 between the United States and Great Britain, and that between Great Britain and France in 1839, has again been admitted in the treaty of 1867." (*Nouveau Droit International Public*, Paris, 1885, section 803.)

This is only a recognition of the permanency and the continuity of States. The treaty of 1818 is not a separate fact unconnected with the later policy of Great Britain. Its negotiators were not parties to such international convention and their powers disappeared as soon as they signed the document on behalf of their countries. The parties to the treaty of 1818 were the United States and Great Britain, and what Great Britain meant in 1818 about bays and fisheries,

when they, for the first time, fixed a marginal jurisdiction of *three miles*, can be very well explained by what Great Britain, the same permanent political entity, understood in 1839, 1843, 1867, 1874, 1878 and 1882, when fixing the very same zone of territorial waters. That a bay in Europe should be considered as different from a bay in America, and subject to other principles of international law, can not be admitted in the face of it. What the practice of Great Britain has been outside the treaties is very well known to the tribunal, and the examples might be multiplied of the cases in which that nation has ordered its subordinates to apply to the bays on these fisheries the *ten-mile* entrance rule or the *six miles*, according to the occasion. It has been repeatedly said that such have been only relaxations of the strict right, assented to by Great Britain in order to avoid friction on certain special occasions. That may be. But it may also be asserted that such relaxations have been very many, and that the constant, uniform, never-contradicted practice of concluding fishery treaties from 1839 down to the present day, in all of which the ten miles entrance bays are recognized, is the clear sign of a policy. This policy has but very lately found a most public, solemn, and unequivocal expression. "On a question asked in Parliament on the 21st of February, 1907," says Pitt Cobbett, a distinguished English writer, with respect to the Moray Firth Case, "it was stated that, according to the view of the Foreign Office, the Admiralty, the Colonial Office, the Board of Trade, and the Board of Agriculture and Fisheries, the term 'territorial waters' was deemed to include waters extending from the coast line of any part of the territory of a State to *three miles* from the low-water mark of such coast line and the waters of all bays the entrance to which is not more than *six miles*, and of which the entire land boundary forms part of the territory of the same state." (Pitt Cobbett, *Cases and Opinions on International Law*, vol. 1, p. 143.)

Is there a contradiction between these *six miles* and the *ten miles* of the treaties just referred to? Not at all. The *six miles* are the consequence of the *three miles* marginal belt of territorial waters in their coincidence from both sides at the inlets of the coast and the *ten miles*, far from being an arbitrary measure, are simply an extension, a margin given for convenience to the strict *six miles* with fishery purposes. Where the *miles* represent *sixty* to a degree in latitude the *ten miles* are, besides, the sixth part of the same degree. The American Government, in reply to the observations made to Secretary Bayard's memorandum of 1888, said very precisely: "The width of *ten miles* was proposed not only because it had been followed in conventions between many other Powers, but also because it was deemed reasonable and just in the present case; this Government recognizing

the fact that while it might have claimed a width of *six miles* as a basis of settlement, fishing within bays and harbors only slightly wider would be confined to areas so narrow as to render it practically valueless and almost necessarily expose the fishermen to constant danger of carrying their operations into forbidden waters." (British Case Appendix, page 416.) And Professor John Bassett Moore, a recognized authority on international law, in a communication addressed to the Institute of International Law, said very forcibly: "Since you observe that there does not appear to be any convincing reason to prefer the *ten-mile line* in such a case to that of double *three miles*, I may say that there have been supposed to exist reasons both of convenience and of safety. The *ten-mile line* has been adopted in the cases referred to as a practical rule. The transgression of an encroachment upon territorial waters by fishing vessels is generally a grave offense, involving in many instances the forfeiture of the offending vessel, and it is obvious that the narrower the space in which it is permissible to fish, the more likely the offense is to be committed. In order, therefore, that fishing may be practicable and safe and not constantly attended with the risk of violating territorial waters, it has been thought to be expedient not to allow it where the extent of free waters between the *three miles* drawn on each side of the bay is less than *four miles*. This is the reason of the *ten-mile line*. Its intention is not to hamper or restrict the right to fish, but to render its exercise practicable and safe. When fishermen fall in with a shoal of fish, the impulse to follow it is so strong as to make the possibilities of transgression very serious within narrow limits of free waters. Hence it has been deemed wiser to exclude them from space less than *four miles* each way from the forbidden lines. In spaces less than this operations are not only hazardous, but so circumscribed as to render them of little practical value." (*Annuaire de l'Institut de Droit International*, 1894, p. 146.)

So the use of the *ten mile* bays so constantly put into practice by Great Britain in its fishery treaties has its root and connection with the marginal belt of *three miles* for the territorial waters. So much so that the tribunal having decided not to adjudicate in this case the *ten miles* entrance to the bays or the treaty of 1818, this will be the only one exception in which the *ten miles* of the bays do not follow as a consequence the strip of *three miles* of territorial waters, the historical bays and estuaries always excepted.

And it is for that reason that an usage so firmly and for so long a time established ought, in my opinion, be applied to the construction of the treaty under consideration, much more so, when custom, one of the recognized sources of law, international as well as municipal, is supported in this case by reason and by the acquiescence and the practice of many nations.

The tribunal has decided that: "In case of bays the *3 miles* (of the treaty) are to be measured from a straight line drawn across the body of water at the place where it ceases to have the configuration characteristic of a bay. At all other places the three miles are to be measured following the sinuosities of the coast." But no rule is laid out or general principle evolved for the parties to know what the nature of such configuration is or by what methods the points should be ascertained from which the bay should lose the characteristics of such. There lies the whole contention and the whole difficulty, not satisfactorily solved, to my mind, by simply recommending, without the scope of the award and as a system of procedure for resolving future contestations under Article 4 of the treaty of arbitration, a series of lines, which practical as they may be supposed to be, can not be adopted by the parties without concluding a new treaty.

These are the reasons for my dissent, which I much regret, on Question 5.

Done at The Hague, September 7th, 1910.

LUIS M. DRAGO.

*1912, July 20.—Agreement with Great Britain adopting, with certain modifications, the rules and method of procedure recommended in the award of September 7, 1910, of the North Atlantic Coast Fisheries Arbitration.*¹

ARTICLE 2.

And whereas the Tribunal of Arbitration in its award decided that—

In case of bays the *3 marine miles* are to be measured from a straight line drawn across the body of water at the place where it ceases to have the configuration and characteristics of a bay. At all other places the *3 marine miles* are to be measured following the sinuosities of the coast.

And whereas the Tribunal made certain recommendations for the determination of the limits of the bays enumerated in the award;

Now, therefore, it is agreed that the recommendations, in so far as the same relate to bays contiguous to the territory of the Dominion of Canada, to which Question V of the Special Agreement is applicable, are hereby adopted, to wit:

"In every bay not hereinafter specifically provided for, the limits of exclusion shall be drawn *three miles* seaward from a straight line across the bay in the part nearest the entrance at the first point where the width does not exceed *ten miles*."

[The lines for special bays are here defined.]

¹ *Treaties, etc., between the United States and Other Powers* (Charles), vol. 3, p. 69.

1915, February 20.—*Identic note to Germany and Great Britain regarding the sowing of mines upon the high seas and in territorial waters.*¹

The Government of the United States respectfully suggests that an agreement in terms like the following might be entered into. . . .

Germany and Great Britain to agree:

First. That neither will sow any floating mines, whether upon the high seas or in territorial waters; that neither will plant on the high seas anchored mines, except within *cannon range* of harbors for defensive purposes only; . . .

URUGUAY

1914, August 7.—*Maritime rules of neutrality which ought to be observed in all the ports, roadsteads and territorial and jurisdictional waters of the Republic of Uruguay.*²

ARTICLE 2. In accordance with the principle established by the treaty of Montevideo in 1899 (Penal Law, Article 12), and with the principles generally accepted in these matters, the waters will be considered as territorial waters to a distance of *five miles* from the coast of the mainland and islands, from the visible outlying shoals, and the fixed marks which determine the limit of banks not visible. With regard to bays, the distance of five miles will be measured along a straight line run across the bay at the point nearest its entrance. In addition to the bays or roadsteads established as such by law and custom, those places on the coast will be considered as such which possess their characteristic form and also have an opening of not more than ten miles. For the other boundary waters the rule will be according to each case, the middle line, the *thalweg* (channel) or the common jurisdiction as determined by the various treaties and situations.

¹ *New York Times*, Mar. 18, 1915.

² U. S. Naval War College, *International Law Topics*, 1916, p. 107; *Registro Nacional*, 1914, p. 393.

SUPPLEMENTARY DOCUMENTS

FRANCE

*1790, December 1.—Law relative to the national domains, concessions and exchanges that have been made, and appanages.*¹

The National Assembly has decreed, and we order the following:

DECREE OF THE NATIONAL ASSEMBLY OF NOVEMBER 22, 1790.

The National Assembly considering, first, that the public domain has during several centuries formed the principal and almost the sole source of the national wealth. . . .

Considering, finally, that this principle if given execution in too rigorous a manner might produce great inconvenience in the civil order and cause an infinity of minor evils that always have more or less influence upon the sum of the general welfare; that it comports with the dignity of a great nation and the duty of its representatives to moderate such rigor and to lay down definite rules suitable for reconciling the national interest with that of every citizen,—decrees as follows:

I. On the nature of the national domain and its principal divisions.

ARTICLE 1. The national domain, properly so called, comprises all real property and all real or mixed rights belonging to the nation whether it has actual possession and enjoyment thereof or has only the right to acquire such possession or actual enjoyment by way of repurchase, reversion or otherwise.

ARTICLE 2. The public ways, the streets and places of the towns, navigable rivers and streams, waterfronts, beaches of the sea, ports, harbors, roadsteads, etc., and in general all portions of the national territory that are not susceptible of private ownership are considered as appurtenant to the public domain. . . .

*1808, October 19.—Decree of the Prize Council declaring valid the capture of the vessel "Daniel Frederick."*²

On June 14, 1808, the *Tilsit*, a French privateer captured, off Pillau, athwart the headland of Brusterol, an American merchant ship, the *Daniel Frederick*, which was anchored there at a distance of three or four leagues from the land.

When the matter was brought before the Prize Council, an attempt was made to have the capture invalidated on the grounds that it

¹ *Bulletin des lois*, Paris, 1806, vol. 2, 163. See *ante.*, p. 320.

² Plistoye et Duverdy, *Traité des prises maritimes*, vol. 1, p. 102.

had occurred in the roadstead of Pillau, and consequently, in a territorial sea of the King of Prussia; both the bays and the gulfs, the claimants added, belonged to the State in which they are situated.

To prove their assertions, they cited:

(1) Article 1, chapter 8, book 7, of the decree of 1681, which is worded as follows: "It is our will that the roadsteads be free to all vessels belonging to our subjects or allies, throughout the extent of our dominion; we forbid all persons of any degree or rank whatsoever, in any way to molest or obstruct such vessels, on pain of corporal punishment";

(2) The opinion of Valin on article 24, chapter 9, book 3, of the same decree, to the effect that a prize would be unlawful, if taken in a foreign port, either friendly or neutral, or on the coast of the hostile country;

(3) The doctrine of Hubner, in his *Treatise on the Seizure of Neutral Ships*:

(4) That of Azuni, in his *Universal System of the Principles of European Maritime Law*, the second edition of which bears the title *European Maritime Law (Le droit maritime de l'Europe)*: "As a consequence of the sovereignty over the sea," says this author, "every port must be considered as belonging to the jurisdiction of the reigning sovereign." The obligations binding, in the case of ports, upon the shipping that approaches them, "are," he adds, "also applicable to bays and gulfs, since they likewise constitute a part of the sovereignty of the ruler in whose dominion they are situated, being also under his protection and safeguard. Consequently the refuge afforded by a bay is no less inviolable than that of a port; and any attack made in either must be considered a manifest violation of international law."

The attorney general, M. Collet-Descotils, refuted these reasons in the following manner:

The Council knows that after long controversies among the publicists concerning the extent that should be given to the liberty of the territorial sea, this distance has been definitely fixed by common law at *cannon range* from the shore.

This distance is that adopted by the Empress of Russia in her ruling of December 31, 1787, Article 2, concerning privateers; by the Grand Duke of Tuscany, Pierre-Léopold, in his ruling of August 1, 1778, Article 1, by the Republic of Genoa in its manifesto of July 1, 1779, Article 1, and by the Republic of Venice in its edict of September 9, 1779, Article 9.

But the claimants make a distinction between the coast and the gulfs, bays, and roadsteads; they claim that the ships taking refuge there are under the protection of the sovereigns to whom the coasts belong.

I know that in support of this plea they have cited the opinion of a justly reputed publicist; but I know, too, that

this author, in the second edition of his work, modified in part the opinion pronounced by him in the first edition.

The opinion pronounced by Valin is not favorable to the case of the claimants as assumed. As for that of Hubner, he says, "it is a question whether belligerents have the right to visit and seize ships in open roadsteads of neutral ports or countries." His answer to this question is that "the arguments pro and con would seem to decide this question in favor of the negative." Moreover, he closes with the following statement: "However difficult it be to determine exactly how far the dominion of the sovereign of the adjacent coast extends, it is sufficiently certain that it does nevertheless extend as far as the *range of its artillery*, which it can at any time use by way of effective warning to those who forget that they are violating the rights of that dominion."

In the present matter we are less concerned with examining the opinion of the various authors on the point in question than we are with ascertaining the rule to be followed according to the common law established by the several powers of Europe.

As regards bays, some are closed—that is, defended; others are open and without defense; and it seems that the one in which the roadstead of Pillau is situated is of the second variety. This roadstead is, consequently, simply an open roadstead, in a part beyond that which can be defended or protected by the artillery of the port.

Now, the prizes made by the privateer, the *Tilsit*, were all made beyond that distance, since, according to the statements of the captor, they were made between 3 and 4 leagues from the land, and, according to the statements of those captured, some were made at a distance of about 3 leagues from the land and others at a distance of more than 2 leagues.

The ruling of the grand duke of Tuscany, August 1, 1778, Article 1, says that "no prize shall be made in the seas adjacent to the Tuscan harbors, seaports, lighthouses, and shores, nor any act of hostility committed within *cannon range*."

Article 1 of the edict of Genoa, of July 1, 1779, is worded as follows: "No act of hostility between belligerent powers shall be committed in the ports or gulfs, or along the shores of our dominion, within *cannon range*."

The Republic of Venice, in its edict of September 9, 1779, Article 9, also decreed that "no act of hostility should be committed in the harbors, roadsteads, or along the shores of its dominion, nor in any sea adjacent thereto, except beyond the *range of a heavy battery gun*."

Article 2 of the ruling of Her Majesty, the Empress of Russia, with regard to privateering, under date of December 31, 1787, is worded as follows: "Russian privateers may pursue enemy ships of war and merchantmen, and attack, seize, or destroy them wherever opportunity offers, except when the ship, seeking refuge, puts itself in due time under the protection of the cannon of a harbor or of the coasts of a neutral power. Moreover, they must not engage in any hostility

in the roadsteads or harbors belonging to neutral powers, before the enemy shall have passed beyond the distance of the *range of a cannon* from the shore." I observe with regard to this final clause, that no distinction is to be made as to whether a ship has passed beyond the distance of the *range of a cannon* from the shore, or whether it has been anchored there.

From the quotations that I have just made it will be evident to the Council that we must consider as a generally recognized principle the fact that roadsteads and bays do not render the ships that cast anchor there inviolable, except as these ships remain under the protection of the cannon of the harbor or of the coast.

Now, this is exactly what the *Daniel Frederick* did not do. It cast anchor—one only—more than twice the distance of the range of a cannon from either Pillau or the coast, and waited in readiness to set sail, if permission was not granted it to enter the harbor. It is a matter of indifference whether the captain and the supercargo were or were not on land, for this request on their part can not constitute any claim either for or against them.

Hence I conclude that there was no violation of the territorial sea of His Majesty, the King of Prussia, in the case of the prize of the *Daniel Frederick*; and that the complaints made by the Ambassador of His Majesty, the King of Prussia, in behalf of the captured, have been made only as the result of an inexact statement, by those captured, of the true circumstances of the said capture.

Dated the nineteenth of October, 1808, decision of the Prize Council declaring valid the seizure of the *Daniel Frederick*.

1870, July 25.—Instructions issued by the Minister of Marine and Colonies to the officers commanding the fleets and vessels of His Imperial Majesty.¹

You will find below the declaration made on the 20th inst. to the senate and legislative body setting forth the necessity in which His Majesty finds himself of taking up arms against Prussia to defend the honor and interests of France and to protect the general equilibrium of Europe. . . .

4. Territorial waters.—Neutrals. You will abstain from any act of hostility in the territorial waters of neutral powers, and you will regard territorial waters as extending to the limit of *cannon range* from low-water mark.

Supplementary instructions.—1. However unrestricted the right of visit in time of war may be, there are two cases in which you should absolutely refrain from exercising it: . . .

2. When the said vessels are within the territorial waters of a neutral power. Territorial waters include along all coasts a zone extend-

¹ Barboux, *Jurisprudence du Conseil des Prises pendant la guerre de 1870–1871*, Annexes Nos. 1 and 2.

ing from 3 miles from low-water mark, this distance being generally adopted to-day as the average limit of *gun range*. (Article 4 of the General Instructions.)

1888, July 31.—*Circular of the Minister of the Marine and Colonies to the maritime authorities for the execution of the international convention of March 14, 1884, relating to the protection of submarine cables.*¹

. . . It is proper, then, in these circumstances and with regard to the application of the convention on the coasts of France, to assign to the territorial sea, from the point of view of the policing of telegraphs, a width of *three marine miles*; this distance has, moreover, been adopted for our territorial waters by the first article of the law of March 1, 1888, concerning the prohibition of fishing by foreigners in the French territorial zone.

1904, March 9.—*Convention with Switzerland to regulate fishing in frontier waters.*²

SWITZERLAND.

1904, March 9.—*Convention with France to regulate fishing in frontier waters.*³

ARTICLE 10. The guards of each country can follow offenders and seize prohibited apparatus and fish within a radius of 5 kilometers from the frontier of their respective States.

¹ *Revue internationale de droit maritime*, 1888-1889, p. 213.

² See *infra*.

³ Martens, *Nouveau recueil général*, 2d series, vol. 33, p. 508.



